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70-347

In the Supreme Court
of the United States

OCTOBER TERM, 1970

No. ~~1941~~

ARTHUR ROBERTS, by his father and guardian EDDIE W. ROBERTS,

Petitioner,

v.

COLUMBUS WILLIAMS, individually and as Trusty at the Leflore County Farm; JOHN ARTERBURY, individually and as Superintendent of the Leflore County Farm; GEORGE W. SMITH, individually and as Sheriff of Leflore County; GRAY EVANS, individually and as City Prosecutor of the City of Greenwood; CHARLES DEATON, individually as a Youth Counselor of the Youth Court Division, County Court, Leflore County; CHARLES POLLARD, individually and as Judge of the County Court, Leflore County; and THE FIDELITY & DEPOSIT COMPANY, a corporation,

Defendants,

ULYSSES A. SMITH, W. J. LIPSCOMB, ROBERT H. SWANZY, JAMES D. GREEN and JAMES M. HOOPER, JR., individually and as Members of the Board of Supervisors of Leflore County,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK POZZI
DONALD R. WILSON
RAYMOND J. CONBOY
808 Standard Plaza Building
Portland, Oregon 97204
Attorneys for Petitioner

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 6-71

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 1, 1971.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi, Greenville Division, officially reported at 302 F. Supp. 972 (1969), is appended to this petition as "Exhibit C."

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, is appended to this petition as "Exhibit A." The Judgment of the Court of Appeals is appended to this petition as "Exhibit B."

JURISDICTION

The judgment of the Fifth Circuit was entered on April 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Where supervisors of a county penal institution have a statutory obligation to regulate the working, guarding, safekeeping and discipline of county prisoners engaged in labor upon public works, are they immune from tort liability under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 when, in the exercise of their duties, the supervisors countenance the flogging of Negro prisoners and permit Negro prisoners to be guarded by fellow prisoners armed with loaded shotguns, and as a consequence a 15 year old prisoner is shot by an armed trusty guard, re-

sulting in loss of both of the prisoner's eyes, brain damage and other permanent injury.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Eighth Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Civil Rights Act of 1871, § 1, R.S. 1979, 42 U.S.C. § 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Mississippi Constitution, Art. 6, § 170:

"Each county shall be divided into five districts, a resident freeholder of each district shall be selected, in the manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law * * *"

Mississippi Constitution, Art. 5, § 138:

"The sheriff, coroner, assessor, surveyor, clerks of courts, and members of the board of supervisors of the several counties, and all other officers exercising local jurisdiction therein, shall be selected in the manner provided by law for each county."

Mississippi Code 1942 Annotated, § 2870:

"Each county shall be divided into five (5) districts, with due regard to equality of population and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one member of the board of supervisors * * *"

Mississippi Code 1942 Annotated, § 7900:

"It is the imperative duty of the board of supervisors in each county in this State to require

each convict sentenced to imprisonment in the county jail and the payment of a fine and costs, or to imprisonment and payment of costs, or to payment of fine and costs, to work out the sentence on the county convict farm or on the public roads or other public works of the county, or in a contiguous county, as herein provided. * * *"

Mississippi Code 1942 Annotated, § 7901:

"In order to carry out the provisions of the last preceding section the board of supervisors of each county in this state are authorized and directed, whenever it may be necessary to buy or lease a sufficient number of acres of land within reasonable and convenient distance of the county jail to be used by the county as a county convict farm. They are also authorized to make any necessary improvements thereon, such as erecting necessary and convenient buildings, clearing, terracing and ditching and leveeing, or otherwise repairing and improving such farm, so that it may be suitable to be used as a farm upon which to work the convicts committed to the county jail, and they shall employ a competent and suitable person to be known as foreman of county farm to superintend such convict farm and manage it and to work the convicts sentenced to the county jail thereon. The board of supervisors in each county shall also have full and complete authority to buy, or rent necessary mules or horses, tractors, farming tools and implements and all other necessary things incidental to the successful operation of such convict farm in such numbers and amounts as they may reasonably contemplate will be necessary to successfully oper-

ate such farm, having in view, first, the continuous employment of all the convicts able to work thereon at remunerative labor, and second, the operation of said farm in the most economical manner consistent with the continuous working of such convicts.

Mississippi Code 1942 Annotated, § 7904:

"In any county where it is clearly more advantageous to the county to work the county convicts or some of them on the public roads of the county, or on other works of the county exclusively public in their character, the board of supervisors shall have the authority so to order, and in such cases the board shall establish all proper regulations for the working, guarding, safekeeping, clothing, housing and subsistence of convicts while so working, and shall provide all the necessary equipment for such purpose. And the board shall establish regulations for the discipline of convicts on said works, and on county farms, when a convict is persistently idle or refractory, and may enforce such regulations by penalties."

Mississippi Code 1942 Annotated § 7914:

". . . The sheriff or his deputies shall visit the convict camp or county farms where the convicts of his county are kept or worked at least once in every month and oftener if necessary. He shall make a thorough inspection and investigation of the treatment of convicts and report the same in writing to the board of supervisors. For failure to perform duty in this respect the board of supervisors may fine the sheriff $25.00."

Mississippi Code 1942 Annotated, § 7916:

"On complaint by or on behalf of any convict to any county or county district officer, that the convict had been improperly treated in any respect, it shall be the duty of such officer at once to investigate the complaint and if it is believed to be well founded, to report the facts to the president of the board of supervisors, or to the board in session and upon such report the board shall cite the person complained of to appear before it, and such action shall be taken by the board as shall be proper"

STATEMENT OF THE CASE

Petitioner Arthur Roberts, a 15 year old Negro prisoner at the Leflore County penal farm, was shot in the face with a blast from a shotgun levelled at him by Columbus Williams, an armed trusty guard at the farm. As a result of the shooting, both of Roberts' eyes have been removed, and he suffers brain damage and other injuries including semi-paralysis and fainting spells (Tr. 37, 38, 87-97). The shooting occurred on June 28, 1965.

The petitioner, a life-long resident of Greenwood and Itta Bena, Leflore County, Mississippi (Tr. 60, 61), was one of nine children of Eddie W. Roberts, a Baptist Minister and a bus driver for the County (Tr. 181-183, 187). Petitioner was twice confined to the county penal farm before his fifteenth birthday on June 22, 1965 (Tr. 60). The first occasion was in January, 1965, following an episode of breaking into

Mississippi Valley State College. On January 6, 1965, the fourteen year old petitioner was hailed before the Youth Judge of Leflore County, who transferred his case to the Justice of the Peace Court in Itta Bena. The justice of the peace sentenced petitioner to the county farm, where he was confined among adult prisoners for "two whole months and about a part of another month" (Tr. 100-101).

The confinement with which this petition is concerned occurred following a shoplifting incident at the Kroger store in Greenwood. Plaintiff was caught stealing "a bag of cookies and two small kitchen knives and a package of cheese" (Tr. 64). On April 15, 1965, he was sentenced by Gray Evans, the city prosecutor of the City of Greenwood, then sitting as city court judge *pro-tempore*, to ninety days' imprisonment at the county penal farm (Tr. 65, 451-452, 453, 455, 464-466). Because of irregularities in the procedure by which the city court obtained jurisdiction to try this minor defendant, the plaintiff's complaint in the United States District Court named Gray Evans as a defendant, as well as Charles Pollard, Judge of the County Court for Leflore County, and Charles Deaton, a youth court counselor. The district court ultimately dismissed Evans, Pollard and Deaton from the case, and this ruling was not challenged by petitioner on his cross-appeal in the Fifth Circuit (Appendix C, p. 43; Appendix A, p. 3). Accordingly, the circumstances of plaintiff's commitment to the county penal farm are not material to this petition.

After his plea of guilty and sentence, Arthur Roberts was transferred immediately to the Leflore County Farm (Tr. 66). The county has a written contract for use of city prisoners (Tr. 271). At the County Farm, all black male prisoners, juveniles as well as adults, are kept under lock and key in the "cage," a single large cell, except when they are working (Tr. 69, 382, 385).

Under Mississippi law each county is divided into five districts (or "beats"). The voters of each district elect one resident freeholder and the five so elected constitute the board of supervisors of the county, with "full jurisdiction" over roads, ferries and bridges, and with such other duties "as may be required by law." Miss. Code Ann. § 2870 (See p. 4, supra). The Mississippi legislature has implemented this constitutional provision by making the county board of supervisors responsible for the working of county prisoners on the county convict farms or on the public roads or other public works of the county. Miss. Code Ann. § 7900 (p. 4 supra). The supervisors are authorized and directed by law to establish county convict farms, and are given general supervisory authority over these farms. Miss. Code Ann. §§ 7901, 7914, 7916. The supervisors are also required to employ a competent and suitable person to be known as foreman of the county farm, to superintend and manage it and work the convicts sentenced to the county jail thereon. Miss. Code Ann. § 7901. The Mississippi code further provides that where convicts are worked on the public roads or other public works, the board

of supervisors ". . . shall establish all proper regulations for the working, guarding, safekeeping, clothing, housing and subsistence of convicts while so working." The board is also required to establish regulations for the discipline of convicts on public works and on county farms. Miss. Code Ann. § 7904 (p. 6 supra).

Respondents Ulysses A. Smith, W. J. Lipscomb, Robert H. Swanzy, James D. Green and James M. Hooper were the members of the board of supervisors of Leflore County at the time of petitioner's confinement to the county farm on April 15, 1965 and subsequent shooting. The defendant John Arterbury was, at that time, the superintendent or "foreman" of the Leflore County farm.

In carrying out these statutory duties, it was the practice of the respondent supervisors to make periodic inspections of the county farm (Tr. 252, 265, 266, 276, 277, 288, 297, 298, 323) and to work the entire group of black prisoners (averaging 25 to 30 convicts) for one week at a time in each district, or "beat." The prisoners thus constituted a labor gang that was rotated weekly among the five districts, performing such tasks as cutting weeds, cleaning ditches, fixing bridges and patching blacktop (Tr. 254, 265, 277, 289, 299). Occasionally a small group of prisoners would be used out of turn for a particular job in a district other than that to which the gang had been regularly assigned (Tr. 253, 254, 265).

At the Leflore County Farm, black prisoners are

flogged for breaches of discipline (Tr. 76, 77, 154, 332). Mr. Rufus Freeman, who was superintendent of the farm at the time of trial and assistant superintendent when the petitioner was shot (Tr. 329), testified that the instrument used for whipping prisoners was a leather strap, approximately 5 feet long, 4 inches wide, and a quarter of an inch thick tapering down to a thin edge (Tr. 332, 333). On approximately four different occasions while he was a prisoner at the County Farm, the petitioner was flogged by Sheriff Arterbury because he "wasn't working hard enough" (Tr. 76, 77). Another former prisoner testified that he was whipped for "cussing a white man" (Tr. 154).

The strap was hanging on the wall at the county farm, and three of the five supervisors admitted that they knew of its presence and purpose (Tr. 258-260, 281-282, 284, 294-295, 332).[2] Respondent Hooper testified that it was "common knowledge" that floggings were administered on the Leflore County Farm under Arterbury's supervision (Tr. 282).

While employed on the county roads and other public works in Leflore County, prisoners are supervised by armed trusty guards (Tr. 69-71, 151, 255, 268, 331, 357, 359, 360). The trusty guards, or "shooters," as they were commonly (and prophetically) called, were armed with loaded shotguns (Tr. 364, 365, 369, Williams Depo., p. 30). While engaged

[2] Respondents Lipscomb and Smith denied any knowledge of floggings at the county farm (Tr. 272, 302).

in guard duty, the "shooter" was expected to stand beyond the reach of the prisoners, with a shell in the chamber of his shotgun (Tr. 378, 386).

The trusty guard system applied only to Negro prisoners during petitioner's jail term. The few white prisoners worked, "when they worked," at the county barn without a guard (Tr. 391, 359, 335). At night, trusty guards occupied the same "cage" or cell as the other Negro prisoners. The only privilege which they enjoyed, other than as guards, was the right to leave the cage at visiting time on Sunday evening to mingle with friends and relatives (Tr. 360).

The use of armed prisoners as guards is of long standing in Leflore County, and was known to all of the county supervisors (Tr. 255, 268, 284, 302, 357; Pl. Ex. 31, Swanzy Depo., p. 4). Although the board of supervisors had a duty under state law to regulate the guarding and safekeeping of convicts while working on public roads and other county projects (Miss. Code Ann., § 7904, supra, p. 6) none of the respondent supervisors ever made any effort to terminate the use of prisoners as armed guards or to circumscribe or regulate the use of such guards (Tr. 260, 261, 285, 295, 302; Pl. Ex. 31, Lipscomb Depo. p. 11). Respondent Lipscomb was under the impression that Leflore County was the only county in Mississippi which used trusty guards (Tr. 270). Later, counsel for the respondent supervisors produced evidence that armed trusty guards were also used at the penal farm in Sunflower County, which is contiguous

to Leflore County (Tr. 396, 397). Uncontradicted expert testimony established that the trusty system exists only in Mississippi, Arkansas and "to a limited extent" in Louisiana (Tr. 215, 216, 226).

Among the inmates at the Leflore County Farm in 1965 was a prisoner named Columbus Williams, a 23 year old, muscular, 211 pound Negro with a fourth grade education (Williams Depo., pp. 6, 8, 13). Williams was serving a sentence upon a plea of guilty to the charge of assault with intent to kill (Williams Depo., p. 11; Tr. 375, 376). For a time, Williams worked as a trusty at the Greenwood city jail, but while serving his term as a trusty was convicted of petty larceny. He was then sent to the county farm (Williams Depo., pp. 37, 40; Tr. 376, 377). The superintendent of the county farm, defendant Arterbury, was aware of these offenses (Tr. 375-377).

Williams' qualities apparently recommended him to Arterbury, and Arterbury appointed Williams to be an armed "shooter" after another trusty guard had served his time and was discharged (Tr. 362, 363, 385). Arterbury testified: "I used [Williams] as a trusty out working in the garden and as a plowhand, and then when I needed what we called a 'shooter' I didn't have one out of the line there that I thought I could draw from, and I used him. He was obedient and he did his work right, and he never gave me any trouble" (Tr. 384, 385). The weapon which Williams used while guarding the prisoners was a 12 gauge Remington pump-action shotgun (Tr. 141, 143, 364;

Pl. Ex. 26, 27), lethal at a range of 40 yards (Tr. 144, 382).

There was some conflict in the testimony concerning the amount of instruction Williams received in the handling of firearms. At best, it was minimal. The trial court made the following findings of fact which were approved by the Court of Appeals:

> "Arterbury gave Williams only the briefest instructions concerning the use of the gun, telling him 'to be careful.' There were no meaningful demonstrations by Arterbury or his assistants to teach Williams the use of the gun or its safe handling, or to make certain that he was competent for guard duty. Specifically, Williams was not instructed, at all costs, never to point the shotgun in any direction or at any object at which he was not ready to fire, nor was he instructed to, at all times, examine the safety to determine that it had not become dislodged. But Arterbury did instruct Williams to inject a shell into the firing chamber whenever the work crew had reached the area where guard duty would commence. So far as is known, prior to the shooting, Williams had never shot the gun in target practice, nor had he at any time received expert instruction as to its handling and care. * * *" (Appendix A, p. 6, Appendix C, p. 48).
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> * * * Since the shooting in this case occurred under the most needless and avoidable circumstances, it is patent that Williams was thoroughly ignorant—indeed incompetent—in handling of a firearm. * * *" (Appendix C, p. 71; Appendix A, p. 7).

Arterbury at no time received any instructions, directives, orders or suggestions from the county supervisors concerning the use, selection or training of trusty guards (Tr. 387).

On June 28, 1965, the prisoners were taken on a "prison truck" to a county barn near Morgan City, where they were divided into two groups. The county road foreman took one group of six prisoners, including the petitioner and Columbus Williams, to a place in or near Morgan City (Tr. 83, 114, 115, 323-324, 326, 328).

The five prisoners, with Columbus Williams as guard, were then put to work doing road work (Tr. 150, 114). The gang worked under the supervision of Williams and possibly a road foreman until approximately 11:30 a.m. when the men were taken back to the County Barn in Morgan City for lunch (Tr. 83). After a short lunch, petitioner laid on the ground to rest, with his head propped up against a "little house" near the county barn (Tr. 84). While lying in this position, the petitioner was shot by Columbus Williams. The petitioner testified to the shooting in the following words:

> "He asked—Columbus asked Jimmy Jordan to get him a rag. He had been spraying some white paint, or something, on his shoes, and got some on the gun. He asked Jimmy Lee Jordan to get him a rag to wipe it off, and Jimmy Lee told him he wouldn't get it, and then he asked me, and I told him I wasn't going to get it. Before he asked me, when he called my name, I

> raised my hand up and pulled my cap from over my eyes. He told me to get the rag and I told him I wasn't going to do it. Then I raised my hand back up and pulled my cap over my eyes, and the minute I'd taken it down—it was about a minute after I'd taken my hand down I was shot." (Tr. 85)

The petitioner testified that Williams had the shotgun in his hand, that he "* * * was holding the barrel of it with his left hand and holding the other part with his right hand. He had it pointed towards me." (Tr. 86). At this time Williams was standing in the doorway of the barn (Tr. 122).

The petitioner's testimony was supported by that of a 16 or 17 year old fellow prisoner, Douglas Attison (Tr. 148). Attison testified that "* * * Arthur Roberts said he wasn't going to do it, it was lunch period and he was going to rest, and Columbus told him yes, he was, and throwed the gun on him and it shot" (Tr. 156). Attison testified that the gun was pointed towards Arthur Roberts when it fired (Tr. 157, 163-166). Columbus Williams denied that he had asked the prisoners to run an errand for him and claimed that he had just picked up the gun and had cradled it under his arm when the gun went off as he leaned against the door of the county barn (Williams Depo., pp. 67, 68). According to another prisoner, who at the time of testifying was an inmate of the Mississippi State Penitentiary, Williams had just picked the gun up by the barrel and put it under his right arm and had taken one or two steps when it

fired. He did not remember Williams saying anything to the petitioner (Tr. 312, 313).

Although the respondent supervisors and defendant Arterbury denied any knowledge of the fact, Columbus Williams appears to have been a man of violent disposition. The petitioner testified that on one occasion Williams argued with and beat another prisoner in the cage, and on another occasion struck a prisoner in the back with the barrel of his gun while they were out working (Tr. 81). About two weeks before petitioner was shot, Williams beat the petitioner when he failed to locate some newspapers that Williams was looking for. At the time, the prisoners were working near a church, and Williams "* * * laid the shotgun down on one of the graves and throwed me down and beat me on my chest and on my arms" with his fists (Tr. 79-81). At the time of the beating, petitioner was 15 years old, weighed approximately 140 pounds and was about 5 feet 8 inches tall (Tr. 72, 73). Williams was a muscular 211 pound man, nearly six feet tall (Williams Depo., pp. 6, 8, 13).

The trial court made a finding of fact that the shooting was negligent rather than deliberate (Appendix C, p. 48), and the Court of Appeals concurred in that finding (Appendix A, p. 5). The weapon involved in the shooting was examined by a gunsmith in preparation for trial (Tr. 137-139). This witness determined that the weapon was mechanically sound in every respect and could not be fired with the safety

on (Tr. 140). The trigger pull operated within normal limits, as did the safety push button, and the gun would not fire either with the safety on or off when repeatedly test-dropped (Tr. 140, 141).

The petitioner brought an action in the United States District Court for the Northern District of Mississippi, Greenville Division, against the respondent supervisors, against county farm superintendent John Arterbury, against the judges and youth counselor instrumental in sending the minor petitioner to the Leflore County Farm, against George Smith, individually and as sheriff of Leflore County and his surety, The Fidelity & Deposit Company, and against Columbus Williams. The complaint stated four "causes of action" (or counts). The first cause of action was based on Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Jurisdiction of the District Court was based upon 28 U.S.C. § 1343(3). This cause of action alleged that all defendants (except the sheriff's surety) deprived plaintiff of rights, privileges and immunities secured to him by the Fourteenth Amendment of the Constitution of the United States, "* * * including the right not to be deprived of life or liberty without due process of law, the right not to suffer cruel and unusual punishment, and the right to be free from unjustified threats and reasonably secure from wanton brutality while a prisoner of the State of Mississippi." The second cause of action charged common law assault and battery. The third charged negligence of all defendants other than the official surety, and the fourth charged false imprisonment.

Jurisdiction of the second, third and fourth causes of action was based upon the ancillary or pendent jurisdiction of the federal court. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

The defendant Columbus Williams was never served with process. The pretrial motions to dismiss and for summary judgment filed by the remaining defendants were disposed of as described in the following quotation from the district court opinion:

> "On March 31, 1967, Circuit Judge Claude F. Clayton, then District Judge, granted summary judgment in favor of Pollard and Deaton on the ground of judicial immunity and they were dismissed from the suit. Motion for summary judgment was overruled as to the defendant Evans. The court overruled Arterbury's motion to dismiss for failure to state a claim on the first three causes of action but said motion was sustained as to the fourth. Defendant Smith, the county sheriff, and his official surety were also granted motion for summary judgment, which was not opposed by plaintiff. A motion to dismiss filed by the members of the board of supervisors was deferred until trial." (Appendix C. p. 43).

The district court held the defendant Arterbury liable, and assessed petitioner's damages against him at $85,000. The trial court held that under Mississippi law a sheriff is not immune from suit by a prisoner injured as a consequence of the sheriff's failure to exercise ordinary care for the preservation of the life and health of those subject to his charge (Ap-

pendix C, p. 66). The trial court concluded that Arterbury was also liable under 42 U.S.C. § 1983 upon the ground that Arterbury was acting under color of state law, that imprisonment "under the extra hazardous conditions to which plaintiff was needlessly exposed" constituted cruel and inhuman punishment, and that "* * * the right of a state prisoner to be free from cruel and unusual punishment, or to be within the protection of the Eighth Amendment is one of the rights that a state prisoner may, in a proper case enforce under § 1983" (Appendix C, pp. 72, 73).

The trial court held, however, that the individual board members were immune from suit under § 1983. The trial court reasoned that Arterbury was not an agent of the supervisors so as impose liability on the theory of respondeat superior. The court found that the supervisors were immune from suit for discretionary acts under Mississippi law, and that, considering the matter exclusively as an issue of federal law under § 1983, "* * * by the weight of federal authority, § 1983 immunity is granted to a state officer for his failure to perform a discretionary act as opposed to a mere ministerial duty." (Appendix C, p. 63). The trial court further reasoned as follows:

> "As applied to the case at bar, while § 7904 [Miss. Code Anno. § 1904] imposes upon the board a duty to promulgate regulations for the guarding of prisoners, it makes no attempt to dictate what regulations might be 'proper'; and the only reasonable inference to be drawn therefrom is that the legislature intended that the

board have unfettered discretion in drawing what regulations are deemed proper. We are clear that under any applicable federal law, county supervisors may not be held personally liable for failure to issue any regulations where, had they in fact issued certain regulations, they could not be held individually liable for a neglect of the Board in failing to provide regulations of such character as would reasonably protect the interest of the working convicts. Conceivably, regulations might have been established by the Board imposing the most exacting standards of proficiency in the use of firearms for one to be an armed guard, or which might have prescribed under what precise conditions a trusty could carry firearms, or again which might have altogether prohibited the use of convicts for armed guard duty. These matters go entirely to the exercise of judgment and discretion; had the Board acted negligently in the adoption of imperfect regulations, there would be no liability because of the discretionary nature of the act. The Board's nonfeasance in the same area of discretion may lead to no different result." (Appendix C, pp. 64-66).

The Court of Appeals affirmed the judgment of liability against Arterbury, but found that the award of damages was inadequate and remanded the case for further consideration of that issue. With respect to § 1983 liability of Arterbury, the Court of Appeals concluded:

"The evidence herein as to beating of juvenile and adult prisoners and the use of a trusty guard previously convicted of assault with intent to kill,

> come into focus with the demonstrated indifference to prisoners' safety, as establishing a cruel state of mind which with physical harm and causation provide the basis of Eighth Amendment tort liability. So far we speculate, but we do not mean to decide cases not before us: what we hold is that whatever the proper definition of a cruel and unusual punishment, the trial judge rightly decided that this case was within it." (Appendix A, p. 20).

The Court of Appeals further concluded that even if it was mistaken in the foregoing analysis, pendent jurisdiction was established and the plaintiff had made out his case against Arterbury under state law (Appendix A, pp. 21, 22).

The Court of Appeals also affirmed the trial court's judgment in favor of the respondent members of the board of supervisors, questioning, however, whether § 1983 immunity extended to state officials for discretionary functions to the same extent that the common law protects "high federal officials acting under color of federal law, in the exercise of their discretionary functions." (Appendix A, pp. 26, 27).

The following test was adopted by the Court of Appeals for measuring the liability of the respondent supervisors:

> "We think the Supervisors are in any event not liable for a good faith, reasonable choice among valid policy alternatives, even if an unwise one, and that liability for their negligence will

follow only when the plaintiff can show a clear breach of duty that led to the plaintiff's injury. (Appendix A, p. 28).

The Court stated that the ". . . trusty guard system *per se* was much excoriated in the testimony, and undoubtedly the Supervisors must take responsibility for it. However, its use falls, we believe, outside the ambit of a clear breach of a legal duty. At least one other Mississippi county used it, and some other states. There is no evidence to show that in tolerating or approving it, the Supervisors did not act in good faith and exercise their best judgment, however faulty." (Appendix A, pp. 30, 31).

REASONS FOR GRANTING THE WRIT

This petition presents an important issue of federal law as to which the federal courts of appeal are in conflict and which has not been, but should be, settled by this Court. That issue is whether a county executive official is immune from personal liability under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for injury caused by his official conduct which deprives citizens of rights, privileges or immunities secured by the federal Constitution.

The Court of Appeals held that Superintendent Arterbury was responsible, under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the maiming and blinding of this fifteen-year-old charge. The Court of Appeals held that the respondent mem-

bers of the board of supervisors of Leflore County were not responsible. The Court of Appeals based its decision, with respect to the supervisors, upon a determination that the plaintiff had not shown that the supervisors' conduct was a legal cause of plaintiff's injury.

We believe that the undisputed facts do not permit a distinction, *based on legal causation*, between the § 1983 liability of Arterbury and that of the respondent supervisors. In drawing a distinction where none is permitted by the record, the Court of Appeals avoided a decision which this record requires: the extent to which state public officials (other than judicial officers or state legislators) are immune from personal liability where injury results from official conduct which deprives citizens of rights guaranteed by the federal Constitution.

The Court of Appeals concluded that Arterbury was liable under § 1983 because his management of the county prison system violated Eighth Amendment guarantees against cruel and inhuman punishment applicable to the states under the Fourteenth Amendment, and because this treatment constituted legal causation for petitioner's injury. The Court of Appeals thus summarized its decision:

> "When prison wardens are cruel in their attitudes, negligent as well as intended injuries result." (Appendix A, p. 19).

However, under the rationale of that decision individual members of the board of supervisors would

be no less liable than superintendent Arterbury. It was they who had the duty, under statute, of regulating the guarding and safekeeping of prisoners employed on public works, and they were overseers of the county penal farm. The supervisors knew or should have known that prisoners were regularly flogged;[3] that juveniles were incarcerated in a common "cage" with adult offenders, and that the prisoners were guarded by fellow convicts armed with loaded shotguns. We agree with the statement of the Court of Appeals (which, unfortunately, was not its holding) that it "* * * seems neither fair nor reasonable to construe this exercise of overriding federal power, § 1983, in such a way as to assess liability on a mere underling, loyally carrying out his superior's orders, and to shield parties at whose deliberate fiat or decree the deprivation of lawful rights may have actually occurred, nor does it further the purpose of the Act." (Appendix A, p. 26). If causation was shown under § 1983 as to Arterbury, it was proven as to the respondent members of the board of supervisors. When executive officials, no less than prison wardens, "* * * are cruel in their attitudes, negligent as well as intended injuries result."

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[3] The decision of the Court of Appeals states: "But plaintiff is not suing any more for the discipline he received, at any rate the trial judge's failure to make findings with respect to it, or award damages for it, is not assigned here as error." (Appendix A, p. 30). This is inaccurate. The petitioner's brief in the Court of Appeals assigned error for the district court's refusal to hold the supervisors liable for petitioner's injury under § 1983, and discussed the practice of flogging in support of the claim of a violation of federally protected rights (Brief of Appellee and Cross-Appellant, pp. 37, 39).

The district court held, and the Court of Appeals agreed, that under Mississippi law county supervisors are immune from suit for sins either of misfeasance or nonfeasance (Appendix C, pp. 59-63; Appendix A, pp. 23-26). The Court of Appeals recognized, however, that federal law and not state law governs the issue of liability under § 1983 (Appendix A, pp. 26, 27). See *Lynch* v. *Johnson*, 420 F.2d 818 (C.A. 6, 1970).

This Court has held that state *judicial* officers acting within their jurisdiction are immune from liability under § 1983. *Pierson* v. *Ray*, 386 U.S. 547 (1967). The Court has extended the same immunity to state *legislators*. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). With respect, however, to § 1983 liability of appointed and elected public officials generally, the Court has spoken infrequently, and without offering guidelines badly needed in light of the explosive popularity of § 1983 actions.[4] *Monroe* v. *Pape*, 365 U.S. 167 (1961) and *Pierson* v. *Ray*, 386 U.S. 547 (1967) allow actions under § 1983 against police officers, and *Cooper* v. *Pate*, 378 U.S. 546 (1964) against a warden, neither of whom enjoyed immunity from suit at common law. *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967); *Farmer* v. *State*, 224 Miss. 96, 79 So. 2d 528 (1955); Appendix A, pp. 6, 7. *Monroe* v. *Pape*, supra, teaches that § 1983 "* * * should read against the background of tort liability that makes a man responsible for the natural consequences of his actions." (365 U.S. at 167, 187). The Court's decisions go no farther.

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[4] See cases collected, 42 U.S.C.A. § 1983 Notes 103 through 157.

Broadly stated, the issue presented by this petition is the extent to which public servants other than legislators or judicial officers can claim immunity from prosecution under § 1983. If executive officers enjoy the same immunity extended to judges and legislators, § 1983 has no content. As the Second Circuit pointed out in *Jobson* v. *Henne*, 355 F.2d 129 (1966):

> "It should be equally clear that both the language and the purpose of the Civil Rights Acts are inconsistent with the application of common law of official immunity in all suits brought under these provisions. See *Norton* v. *McShane*, 332 F.2d 855, 861 (5 Cir., 1964), 380 U.S. 981, 85 S. Ct. 1345, 14 L. Ed. 2d 274 (1965). In suits brought under § 1983 an indispensable element of a plaintiff's case is a showing that the defendant (or defendants) acted 'under color of any statute, ordinance, regulation, custom, or usage, of any State * * *.' 42 U.S.C. § 1983. This test can rarely be satisfied in the case of anyone other than a state official. See *Collins* v. *Hardyman*, 341 U.S. 651, 662, 71 S. Ct. 937, 95 L. Ed. 1253 (1951). To hold that all state officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits brought under state law 'would practically constitute a judicial repeal of the Civil Rights Acts.' *Hoffman* v. *Halden*, 268 F.2d 280, 300 (9th Cir., 1959).

In endeavoring to delineate the extent of liability of public officials under § 1983, the circuit courts of appeal are in disagreement with each other, and sometimes in disagreement with themselves. A few decisions involve actions for damages brought against in-

dividual members of a city council or elected board for discriminatory action of the council or board. In *Nelson* v. *Knox*, 256 F.2d 312 (C.A. 6, 1958) the court concluded that the individual members of a city council did not have complete immunity from a § 1983 action, but would instead have "* * * a qualified privilege, giving them a defense against civil liability, for harms caused by acts done by them in good faith in performance of their official duty as they understood it." The court held that members of a city council "* * * would be liable in damages for pecuniary harm to a plaintiff intentionally inflicted by action, under color of official authority, which the defendants subjectively realized would result in depriving the plaintiff of a right or privilege secured by the Constitution of the United States" (256 F.2d at 312). The court adopted a view set forth by Judge Magruder, concurring in *Cobb* v. *City of Malden*, 202 F.2d 701, 707 (C. A. 1, 1953). For similar cases, see *Lynch* v. *Johnson*, 420 F.2d 818, 822 (C.A. 6, 1970); *McLaughlin* v. *Tilendis*, 398 F.2d 287, 290 (C.A. 7, 1968).

The test set out in *Nelson* v. *Knox*, *supra*, is completely subjective. Under that test, a public official may not be held liable under § 1983 for any act undertaken in good faith with a subjectively innocuous motive, no matter how far out of touch the actor may be with "* * * those canons of decency and fairness which express the notions of justice of English-speaking peoples * * *" *Rochin* v. *California*, 342 U.S. 165, 169 (1951).

Another line of cases grants immunity from suit under § 1983 where injury is inflicted by a public official in the performance of a *discretionary* act, even though the official is alleged to have acted with the worst of motives. *Franklin* v. *Meredith*, 386 F.2d 958 (C.A. 10, 1967); *Hoffman* v. *Halden*, 268 F.2d 280, 301 (C.A. 9, 1959). Indeed, there are recent cases which hold that a prisoner has no remedy at all under § 1983 for brutal treatment inflicted by state prison officials, upon the ground that federal courts will not interfere with prison management. See, e.g., *United States ex rel Atterbury* v. *Ragen*, 237 F.2d 953 (C.A. 7, 1956); *Cole* v. *Smith*, 344 F.2d 721 (C.A. 8, 1965). The current of authority is now the other way. *Jackson* v. *Bishop*, 404 F.2d 571 (C.A. 8, 1968); *Wright* v. *McMann*, 387 F.2d 519 (C.A. 2, 1967). *Howard* v. *Smyth*, 365 F.2d 428 (C.A. 4, 1966).

The cases discussed above show that there is disagreement among those federal courts of appeal which tend to favor immunity of public officials from suit under § 1983. However, not all federal appeals courts favor immunity. In *Jobson* v. *Henne*, 355 F.2d 129 (C.A. 2, 1966), an action for damages by a mental defective against the director of the Newark State School, two assistant directors and the school supervising psychiatrist, alleging that plaintiff had been kept in involuntary servitude, peonage and/or slavery in violation of the Thirteenth Amendment, the Second Circuit reversed a district court decision dismissing the complaint and concluded that ". . . the defense of

official immunity should be applied sparingly in suits brought under § 1983." (355 F.2d at 133, 134). *Jobson* appears to say that a state official may be liable under § 1983 without reference to his motive or the discretionary nature of his official conduct.

In petitioner's case, the court below adopted a test of immunity somewhat different than any of those discussed above. The Court of Appeals held:

> "We think the Supervisors are in any event not liable for a good faith, reasonable choice among valid policy alternatives, even if an unwise one, and that liability for their negligence will follow only when the plaintiff can show a clear breach of duty that led to the plaintiff's injury." (Appendix A, p. 28).

The test fashioned by the Court of Appeals is only partially subjective. The public official is immune from a § 1983 suit if he acts in good faith, but only to the extent that his choice is *reasonable*, which imports an objective limitation.

Petitioner believes that *Jobson* v. *Henne*, supra, 355 F.2d 128 (C.A. 2, 1966), most nearly defines the proper scope of liability of public officials under § 1983. As that court stated:

> "To hold that all State officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits brought under state law 'would practically constitute a judicial repeal of the Civil Rights Acts.' . . . Furthermore, and perhaps more basically, the purpose of § 1983 as well as the other Civil Rights provisions is to

> provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under § 1983." (355 F.2d at 133, 134).

Tests of immunity based upon the subjective good faith of the defendant official or based upon a distinction between discretionary and ministerial acts are, petitioner believes, unworkable.

If this Court should grant certiorari and adopt the test formulated by the court below, that is, granting immunity where the public official makes a ". . . good faith, reasonable choice among a valid policy alternatives, even if an unwise one," we believe that petitioner is entitled to prevail.

The supervisors had a direct and immediate responsibility to regulate guarding and safekeeping of overseers of the county penal farm. Whether or not they acted in "good faith," the supervisors did not act "reasonably" in their treatment of county prisoners. Penology experts called as witnesses by the plaintiff testified to the degrading and demoralizing effect of the use of armed trusty guards and flogging of prisoners (Tr. 211-214, 220-223). A federal court has said that the use of trusty guards ". . . is universally condemned by penologists" and that imprisonment under these and other degrading conditions may constitute

cruel and inhuman punishment. *Holt* v. *Sarver*, 309 F. *Supp.* 362 (E.D., Ark., 1970).[5] In *Jackson* v. *Bishop*, 404 F.2d 571 (C.A., 1968), the Eighth Circuit (speaking through Mr. Justice, then Circuit Judge, Blackmun) enjoined officials of the Arkansas State Penitentiary from flogging prisoners in the very manner used by Superintendent Arterbury on the inmates of the Leflore County Farm. The court held that use of the strap violated the Eighth Amendment. The court observed that "the emphasis is on man's basic dignity, on civilized precepts, and on flexibility and improvement in standards of decency as society progresses and matures." (404 F.2d at 579).

We would like to think that the public officials of Leflore County apprehended, even without listening to

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[5] "In the County's estimation confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of a reasonably civilized people. . . ."

Actually, few, if any, objective criteria are used in selecting trustees; that a man is a bad man, or a dangerous man, or that he has a bad criminal record is by no means a disqualification; on the contrary, it may be a recommendation. . . .

In a very real sense trusty guards have the power of life and death over other inmates. Some guards are doubtless men of some judgment and humanity; others are not. It is within the power of a trusty guard to murder another inmate with practical impunity, and the danger that such will be done is always clear and present. Very recently a gate guard killed another inmate 'carelessly.' One wonders. And there is evidence that recently a guard on night duty fired a shotgun into a crowded barracks because the inmates would not turn off their television set. In any event, the rankers live in deadly fear of the guards and entertain deadly hatred for them, and their feelings are reciprocated fully." (309 F. Supp. at 374).

the testimony of prison wardens or reading court opinions, that their county penal practices offend basic notions of human decency.

The Court of Appeals minimized the responsibility of the supervisors in stating that "they were the governmental body responsible for managing all the county business." This is misleading. The principal duty of the supervisors under the Constitution of Mississippi, Article 6, § 170, is to exercise jurisdiction over roads, ferries and bridges. By statute the supervisors were authorized to buy or lease a county farm on which to work convicts (Miss. Code Ann., § 7901), and in practice, (as permitted by statute), the supervisors utilized convict labor for the upkeep of public roads and works in their respective districts or "beats." The county prison system was far from being an incidental interest of the supervisors. And they had a mandatory duty under state law to regulate the guarding and safekeeping of prisoners engaged upon public works (Miss. Code Ann. § 7904).

The Court of Appeals also concluded that the petitioner could not point to any "individual breach of duty" on the part of a supervisor having a causal relation to petitioner's injury. However, this is not a case where one or more supervisors attempted, without success, to change practices at the county farm. No supervisor disapproved of the county penal administration or made any effort to bring about a change. All were satisfied with a demoralizing and brutal system.

CONCLUSION

For the reasons set forth in this petition, the Court should accept certiorari to establish guidelines for the liability of public officials under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and on the merits should hold that the respondent supervisors are, with superintendent Arterbury, responsible for petitioner's injuries.

FRANK POZZI
DONALD R. WILSON
RAYMOND J. CONBOY
Attorneys for Petitioner,
Arthur Roberts

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28829

ARTHUR ROBERTS, BY HIS FATHER AND GUARDIAN, EDDIE W. ROBERTS,
Plaintiff-Appellee-Cross Appellant,

versus

COLUMBUS WILLIAMS, Individually and as Trusty at the LEFLORE COUNTY FARM, ET AL.,
Defendants-Cross Appellees,

JOHN ARTERBURY,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Mississippi

(April 1, 1971)

Before RIVES and SIMPSON, Circuit Judges, and NICHOLS, Judge of the Court of Claims.*

NICHOLS, Judge: This is a civil action for damages with Federal jurisdiction asserted under the Civil Rights Act of 1871, R.S. § 1979, 42 U.S.C. § 1983, which reads as follows:

> Every person who, under color of any statute,

* Sitting by designation as a member of this panel.

> ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

On April 15, 1965, plaintiff, then fourteen years of age, pled guilty in the City Court of Greenwood, Mississippi, to a charge of petty larceny, and was sentenced to ninety days at the Leflore County Farm. On June 28, 1965, plaintiff was among a group of prisoners performing work on the county roads. A shotgun in the hands of a trusty guard, defendant Williams, discharged into plaintiff's face, causing the loss of both eyes, brain damage and other injuries.

He brought this suit in the District Court, by his father and guardian, alleging a Federal cause of action under § 1983, *supra*, in that he had been caused to suffer "cruel and unusual punishment" in violation of his rights under the Eighth Amendment to the Constitution of the United States, as extended to states by the Fourteenth. He also invoked the "pendent" jurisdiction of the District Court to hear also a claim or negligence under the state tort law. The named defendants pertinent to this appeal were John Arterbury, then Superintendent of the Leflore County Farm, and the individual members of the Board of Supervisors of Leflore County. Columbus Williams was also sued but plaintiff was unable to obtain personal serv-

ice of process upon him. Actions against other named defendants were dismissed.

After trial without a jury, the District Court dismissed the action against the members of the Board of Supervisors on immunity grounds, but found defendant Arterbury liable under both Federal and state law and awarded plaintiff a judgment against him in the amount of $85,000. The opinion reported 302 F. Supp 972 (1969) includes the fact findings. The case is now before us on Arterbury's appeal and plaintiff's cross-appeal from the dismissal against the Supervisors, and on the adequacy of the damages.

I

Liability of Arterbury

Defendant Arterbury had served at the County Farm, either as assistant superintendent or as superintendent for a period in excess of 18 years. He was employed from year to year by the County Board of Supervisors pursuant to statute, Miss. Code Ann. § 7901, requiring them to "employ a competent and suitable person * * * to superintend such convict farm, and manage it and to work the convicts sentenced to the County Jail thereon." The work required of the inmates was performed either at the farm itself or, under authority of Miss. Code Ann. § 7904, "on the public roads of the county." The Board had issued no orders or regulations to govern such working of the convicts as was required by the statute, but members of the Board visited the Farm frequently and had for many years signified their approval of the way

Arterbury did things by tacit acquiescence. They regarded him as of good reputation and well qualified for his post. Another practice of long standing, though apparently without statutory authority, was the use of convicts as armed "trusty guards," the purpose being to save the pay of regular guards. Only one paid guard was employed. The Board did not provide express authorization for or regulations to govern this practice, but it was carried on with their knowledge and tacit approval.

During the time in question, defendant Arterbury had selected as a trusty guard Columbus Williams, a 23 year old man with a 4th grade education who had been convicted of assault with intent to kill, and later of theft. Despite Williams' record, the trier of fact was not convinced that he was "a person of murderous and malicious instincts." 302 F. Supp. at 988. Arterbury's chief reason for selecting Williams was that "he was obedient, did his work right and never gave me any trouble." He made no minimal effort to instruct Williams in the use of the weapon with which he was armed, a 12 gauge pump shotgun. He relied on Williams' affirmation that he had handled one. He told Williams, he testified, to be careful, to keep the safety on, and to put a shell in the chamber when they reached the work site. On June 28, 1965, plaintiff was among a group of prisoners who were working one of the county roads near Morgan City. Columbus Williams, armed with his shotgun, was present in his capacity as trusty guard. During a lunch break, the foreman, who was not a convict, left the scene,

leaving Williams in charge. Williams was standing with the shotgun cradled under his right arm at a distance of no more than 50 feet from plaintiff, who was at rest on the ground. The gun discharged directly at plaintiff causing the injuries here complained of. The trial court, in its very able opinion found:

> * * *. Admittedly, at the time of the shooting Williams had the shotgun loaded with 5 shells, one of which was in the firing chamber, ready to shoot in accordance with his instructions, and the safety was off. The shotgun could not have been discharged with the safety on, as it was in good working order. There is no evidence that Williams stumbled or dropped the gun or suddenly knocked the safety off. Williams was unable to give a satisfactory explanation of why the gun discharged and he failed to check the safety mechanism after its discharge. * * * 302 F. Supp at 987.

While concluding that Williams was "patently incompetent" in handling firearms, the trial judge specifically rejected plaintiff's suggestion that the shooting was intentional. Williams maintained it was accidental. The suggestion, indeed, lacked support in substantial evidence and was inherently incredible. No reason or adequate motive appears why Williams should commit such a crime, and in plain view of several witnesses, at a time when plaintiff, reclining on the ground, offered no shadow of an excuse to fire.

The court held that Williams' conduct constituted gross negligence but determined that the doctrine of *respondeat superior* could not be applied to hold Arter-

bury personally liable. We are not so sure that such is the law in Mississippi. None of the cases cited below is from Mississippi courts and in the one decision of this court cited, *Metoyer* v. *Holman*, 358 F.2d 110 (5th Cir. 1969), there is no indication that liability on the basis of *respondeat superior* was asserted. The action was under diversity jurisdiction. Plaintiff, a prisoner, was shot by a guard while attempting to escape. The trial court was held right in directing a verdict for the warden, because no negligence by him personally was shown. For a split of authority as to this see the annotation at 14 ALR2d 353. However, we are not called upon to decide this issue now because we agree that Arterbury's liability is based on his own negligence.

The trial court, citing *Farmer* v. *State*, 224 Miss. 96, 79 So. 2d 528 (1955), held that under state law, Arterbury owed a duty to the prisoners in his charge to exercise ordinary and reasonable care to protect them from unnecessary harm and for the preservation of their life and health. It is an on point citation. *Farmer* v. *State*, holds a sheriff and a jailer personally liable for the death of a prisoner in their care, because he was denied the medical attention for a case of stomach ulcers. Specifically, the fact finding in this case was:

> * * *. Arterbury gave Williams only the briefest instructions concerning the use of the gun, telling him "to be careful." There were no meaningful demonstrations by Arterbury or his assistants to teach Williams the use of the gun or its

> safe handling, or to make certain that he was competent for guard duty. Specifically Williams was not instructed, at all costs, never to point the shotgun in any direction or at any object at which he was not ready to fire, nor was he instructed to, at all times, examine the safety to determine that it had not become dislodged. But Arterbury did instruct Williams to inject a shell into the firing chamber whenever the work crew had reached the area where guard duty would commence. So far as is known, prior to the shooting, Williams had never shot the gun in target practice, nor had he at any time received expert instruction as to its care and handling. * * * 302 F. Supp at 978.
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> * * * * * *
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> * * *. Since the shooting in this case occurred under the most needless and avoidable circumstances, it is patent that Williams was thoroughly ignorant — indeed incompetent — in the handling of a firearm. * * *. The negligence of Arterbury in this respect, combined with the negligence of Williams in mishandling the gun, produced a classic case of causation which proximately resulted in the shooting of and personal injuries to plaintiff. * * * 302 F. Supp at 988.

Although there are cases holding to the contrary in other jurisdictions, *Bush* v. *Babb*, 23 Ill. App. 2d 285, 163 N.E.2d 594 (1969), defendant does not dispute that *Farmer* v. *State*, *supra*, is the law in Mississippi. For a discussion generally of the duty owed by a sheriff or other officer to prisoners in his custody see the annotation at 14 A.L.R.2d 353 and cases cited therein. The consequences of Arterbury's conduct here is not

unlike that of the defendant in *Asher* v. *Cabell*, 50 F. 818 (5th Cir. 1892), where our predecessors held:

> * * *. That a United States marshal may take prisoners into his custody, permit them to be disarmed and shackled, and then negligently and knowingly deliver them over to incompetent deputies and the known hostility of mobs, without liability for his neglect of duty, is a proposition which we think cannot be sanctioned. * * * 50 F. at 827.

We cannot agree with defendant's assertion that finding him negligent under the circumstances was against the weight of the evidence. We think the evidence amply supports such a finding, and indeed, we could overturn it only if it were "clearly erroneous," F. R. Civ. P. 52 (a), 28 U.S.C.A., *Smith* v. *United States*, 287 F.2d 299 (5th Cir. 1961). In this regard see further our discussion, *infra*, of Arterbury's liability under the Civil Rights Act.

The record reflects a clear-cut breach of legal duty by Arterbury. The trusty guard system, of course, was not instituted by him and we need not decide whether he can be blamed for that. Within that system, the Supervisors relied entirely on him to select and train suitable persons to be trusty guards. Williams' criminal record, which would have been all important in a case of intentional shooting, of course is a minor factor here, except, perhaps as reflecting a callous and indifferent state of mind on Arterbury's part. In view of the finding of accidental shooting, it is the failure to train and supervise that is decisive. The trial judge

had before him uncontradicted expert testimony that in case of a person armed and placed as a guard over prisoners, training in the safe care and use of his weapon is the first and most essential type of training he must receive. This is even more true when, as in this case, the guard is ordered to keep the gun loaded and ready for immediate firing. The gun was proved to have been in good order, such that it would not have fired if the safety had been on as it should have been. All other explanations of the catastrophe being eliminated, the only one remaining is that it fired because of Williams' improper handling of it, and the proximate cause of that, his goodwill being assumed, was the lack of necessary instruction.

Arterbury's chief contention, however, is that the issue of his negligence in failing properly to instruct Williams in the handling of a shotgun was placed before the court too late. He cites as error the introduction over his objection, of any evidence relating to Williams' negligence. This is so, he says, because the trial court, on the day the trial began, allowed plaintiff to amend his pleadings without granting a continuance to Arterbury. Plaintiff's original petition read in pertinent part as follows:

> 20. On or about June 28, 1965, [plaintiff] again worked under the supervision and control of defendant COLUMBUS WILLIAMS in road work at Morgan City, Leflore County. During the luncheon break, while [plaintiff] was lying on the ground resting, defendant COLUMBUS WILLIAMS * * * *intentionally* leveled his shotgun

> [plaintiff's] face, knowing the same to be cocked and loaded, with reckless and wanton disregard of the consequences and of [plaintiff's] rights under the laws of Mississippi and the laws and Constitution of the United States. (Emphasis supplied.)
>
> 21. Defendant COLUMBUS WILLIAMS thereupon shot [plaintiff], the buckshot striking him in the face, head and breast. The discharge of the shotgun and the mutilation of [plaintiff] were reasonably foreseeable consequences of which defendant COLUMBUS WILLIAMS knew or should have known, of the unlawful and unjustified threat *intended* by WILLIAMS when he *intentionally* pointed into [plaintiff's] face a shotgun known by him to be cocked and loaded. (Emphasis supplied.)

On February 18, 1969, the date the trial commenced, plaintiff was allowed to amend his pleadings to add the phrases "or negligently" to the term "intentionally" in paragraphs 20 and 21, and to replace the word "intended" in paragraph 21 with the word "presented." Counsel for plaintiff explained that he had learned only two months prior, during the taking of Columbus Williams' deposition, that Williams considered the shooting unintentional. Defendant was present with counsel during the taking of that deposition but declined to cross-examine Williams. Arterbury's counsel contended that "proceeding with this suit on the basis of negligence changes the entire complexion of this suit as set up in the original complaint," and moved for a continuance. The court denied defend-

ant's motion in the following language:

> Gentlemen, I am of the opinion that this amendment is just simply adding a descriptive adverb, it is not changing the allegations of the case at all. The defense, as I see it, and it has been pleaded for many months, is that this shooting was an entirely nonnegligent, accidental one. The plaintiff's case is contrary, that it was a negligent, tortious shooting. In order for the plaintiff to get the benefit of all acts of negligence it is the opinion of this court that the amendment is quite unnecessary. However, the amendment will be allowed. * * *, and no continuance or delay will be granted in the trial. I do not see that this can operate in any respect whatsoever to the surprise of the defendants. Tr. p. 14.

Arterbury does not object to the allowance of the amendment, only to the denial to him of a continuance. F. R. Civ. P., Rule 15 (b), reads in part as follows:

> * * *. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The granting or denial of a continuance, like the granting or denial of a motion to amend, lies in the

discretion of the trial judge. "And this discretion will not be disturbed unless it is abused." *Heay* v. *Phillips*, 201 F.2d 220 (9th Cir. 1952); *Girard Trust Co.* v. *Amsterdam*, 128 F.2d 376 (5th Cir. 1942). The trial judge's statement, *supra*, denying the continuance, indicates he considered all the aspects of the case including the pleadings themselves, pre-trial conferences, and discovery available to the parties, in concluding that defendant Arterbury could not be surprised by the amendment. Arterbury's brief lists several things he says he could have done "to prepare a defense on this issue which he could not do after trial had begun," i.e., take a further deposition from Williams. However, we find it very significant that in his motion for a new trial submitted on August 7, 1969, Arterbury simply cited as error the failure to grant a continuance and the finding that he was negligent. There was no offer then made of any new evidence, failing which a new trial could only have resulted in the same verdict. Our conclusion is that Arterbury has failed to demonstrate that he was prejudiced by the amendments and therefore the trial judge was within his sound discretion in denying the continuance.

Arturbery next argues that the trial court could not lawfully have found him liable under § 1983 because, "the record in this case is totally void of any conduct on the part of Arterbury that deprived the plaintiff of any Federally protected right." He does not challenge the trial court's finding that he was clearly acting under color of state law. Nor does he

dispute the proposition that a prisoner incarcerated in a state penal institution is entitled to the protection of the Eighth Amendment and to that end may sue under § 1983. What he does say is "that the nature of the conduct attributed to Arterbury in the instant case has never been held actionable under the Civil Rights Act." Citing *Pierson* v. *Ray*, 386 U.S. 547 (1967), he urges us to consider his motives because "to do otherwise would result in a gross distortion of the Civil Rights Act so that a federal claim would arise any time a person acting under color of law is in any way responsible for an injury to a citizen." In this regard, he equates his own conduct with that of "the jailor who accidentally shuts the cell door on a prisoner's hand." For a case holding a deputy liable under tort law for closing a cell door on a prisoner's thumb, see *Davis* v. *Moore*, 215 N.C. 449, 2 S.E.2d 366 (1939). In support of this contention, we are cited to *Kent* v. *Prosse*, 265 F. Supp. 673-74, *aff'd* 385 F.2d 406 (3d Cir. 1967), where the court said:

> An unintentional common law tort does not deprive an injured person, be he prisoner or not, of any constitutional rights secured or guaranteed by the Fourteenth Amendment or the laws of the United States.

However, this dictum goes beyond the issues. In that case, the plaintiff was injured by defective machinery on which he was working and there was no allegation of cruel and unusual punishment or any other federally protected right, rather, the allegation was that plaintiff was deprived of his "right not to be in-

jured." The court held and rightly, 265 F. Supp. at 674, that:

> * * * nowhere have we found authority for the proposition that such right is a constitutional right, or is guaranteed by a law of the United States. Deprivation of civil rights is not aimed at common law negligence, but at deprivation of rights secured by the Fourteenth Amendment, * * *.

Here, the allegation is clearly that plaintiff was deprived of "rights, privileges and immunities secured to him by the Fourteenth Amendment of the United States Constitution, including * * * the right not to suffer cruel and unusual punishment." (Paragraph 24 of plaintiff's complaint). And there are sufficient facts alleged, which if proved, support such a conclusion.

Defendant's reliance on *Pierson* v. *Ray, supra,* as authority for the weight we should give to his motives is misplaced, as should be obvious from a reading of this court's opinion in *Whirl* v. *Kern,* 407 F.2d 781 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969); and a case from the seventh circuit, *Joseph* v. *Rowlen,* 402 F.2d 367 (7th Cir. 1968). In the latter case, the complaint alleged an arrest and detention without probable cause and without a warrant. The court, citing *Monroe* v. *Pape,* 365 U.S. 167 (1961), reversed prior decisions in that circuit which had held that a section 1983 action on such a cause must allege a systematic policy of discrimination against a class or group of persons, and held that the complaint stated

a good cause of action. The court, distinguishing *Pierson*, specifically rejected a "good faith" argument, 402 F.2d at 369, in the following language:

> * * *. The formulae suggested at times for distinguishing causes of action which are cognizable in federal court from those which are not have usually required for a federal cause of action facts indicating flagrancy or an improper motive.
>
> One serious difficulty with such formulae is that there is nothing in the language of sec. 1983, or the fourth and fourteenth amendments as presently construed, on which to base such tests.
>
> Although the Supreme Court has found that certain defenses to a sec. 1983 cause of action exist, apparently by implication, they are defenses of tort causes of action. * * *

The springboard for tort actions under section 1983 is found in *Monroe* v. *Pape, supra,* 365 U.S. at 187, where Mr. Justice Douglas wrote that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." We had occasion to give effect to that language most recently in *Whirl* v. *Kern, supra,* where as a result of the "custodial derelictions" of the sheriff, the plaintiff was kept incarcerated for almost nine months after charges against him had been dismissed. In reference to the words of Justice Douglas, quoted *supra,* we said, 407 F.2d at 787,:

> * * *. We do not find in this language or in the language of the Act itself any intimation that an invasion of constitutional rights unaccompanied by

> an improper motive lies beyond the reach of the Statute.

In reference to other language of that case found at 365 U.S. 180, we said, 407 F.2d at 788,:

> The Supreme Court's use of the term "neglect" and the expansive phrase "or otherwise" appears to us directly contrary to the "improper motive" requirement. Such language suggests that a federal forum is no less desirable for the inadvertent than for the malicious violation of constitutionally protected rights. * * *

We held that where good faith would be a defense to the tort itself, then it could be pleaded as a defense to the section 1983 action based on that tort. We made it clear, however, that the origin of the good faith defense was "in the common law of torts not in the Civil Rights Act." The tort action here is based on negligence and defendant has not shown us any case where good faith was a valid defense to a negligence action. According to Prosser, "the standard imposed by society is an external one, which is not necessarily based upon any moral fault of the individual, and a failure to conform to it is negligence." Prosser, Law of Torts, p. 148, 3d Ed. 1964. We therefore reaffirm our holding in *Whirl* v. *Kern*, that improper motive is not a prerequisite to suit under section 1983.

Arterbury also urges the contention that cruel and unusual punishment cannot result from "mere negligence," and he argues that "the conduct of the state official which has been held as actionable under section 1983, has in every case been of an overt or af-

firmative nature." This contention ignores the circumstances of *Whirl* v. *Kern*, where the conduct of the defendant, without a doubt, constituted a sin of omission. But that case did not rest on the Eighth Amendment. We held there that the allegation of ignorant failure of the sheriff to release the prisoner for nine months after the termination of all proceedings constituted a good cause of action under section 1983. Defendant refers us to nothing in the literature of the law which defines "mere negligence." Negligence, according to the Restatement, Second, Torts, § 282, is conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm." In Prosser, *supra*, at pp. 183-84, we are told:

> The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. * * *
>
> * * * * *
>
> * * *. What is required is merely the conduct of the reasonable man of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of circumstances, demanding only an increased amount of care.

We make no attempt here to set standards for defining cruel and unusual punishment under the Eighth Amendment.

> "Just what constitutes cruel and unusual punishment is one of wide application, capable of acquiring new depths of meaning to conform to more enlightened concepts of criminal justice."

Hancock v. *Avery*, 301 F. Supp. 786, 791 (M. D. Tenn. 1969). For an enlightening discussion of this subject, see the opinion of then Judge, now Justice Blackmun, in *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir., 1968). See also *Anderson* v. *Nosser*, — F.2d — (5th Cir., decided February 10, 1971, slip op. at p. 12 and ff).

Though not the only provision of the Bill of Rights safeguarding prisoners, the Eighth Amendment is the primary one, and there is no reason for it to fall short of the prisoners' needs. The defendant's argument poses a problem, however, in that one's semantic versatility does boggle at the task of bringing a case such as the accidental closing of a cell door on a prisoner's hand (*vide, supra,*) under the rubric of a cruel and unusual punishment, however negligent it may have been. The act may cause the prisoner great pain and suffering, and be highly reprehensible, but what is lacking is a specific intent to be cruel. This intent may exist, however, coincident with the loftiest purposes. *Vide*, in history, Torquemada. We suppose the jailors in *Jackson* v. *Bishop* did not say, before using the strap on a prisoner: "Let us now be cruel." More likely they deemed it for the prisoner's own good. Thus the emphasis on good intent *per se* as an exonerating factor is misplaced. We also think the District Judge's contrast between the petty nature of plaintiff's offense, theft of $2.11 worth of groceries, and his being blinded, maimed and disabled for life, (p. 989) though rhetorically telling, is of itself legally insufficient. The result would not be different if Roberts had robbed

a bank. We see, however, cruelty in the sustained maintenance, over a period of time of a needlessly hazardous condition for plaintiff and other prisoners. We might say careless preparation of a single meal, producing food poisoning in prisoners, was not cruel, but it might be so if the jailors negligently allowed the jail's only drinking water supply to become permanently infected with typhoid bacteria. The word *punishment*, too, implies a wrong in prison management, in contrast to the casual dereliction of a minor prison employee. Thus in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we would look next for a callous indifference to it at the management level, in the sustained knowing maintenance of bad practices and customs. When prison wardens are cruel in their attitudes, negligent as well as intended injuries result. This appears to account on the one hand for the cases holding that inadequate care in the state prison hospital is not *per se* a tort actionable under 42 U.S.C. § 1983, e.g., *Fear* v. *Commonwealth*, 413 F.2d 88 (3rd Cir.), *cert. denied*, 396 U.S. 935 (1969); *United States* v. *Rogen*, 323 F.2d 410 (7th Cir., 1963); *Snow* v. *Gladden*, 338 F.2d 999 (9th Cir., 1964); and on the other, *Holt* v. *Sarver*, 309 F. Supp. 362 (E. D. Ark., 1970), an action for injunction and a declaratory judgment, holding that the Arkansas Trusty Guard system is cruel and unusual punishment under the circumstances found by the court.

In framing a definition of "cruel and unusual punishment" it should make no difference whether

the litigation before the court under § 1983 is brought for injunction or declaratory judgment, or attempts to assess personal tort liability. In Eighth Amendment litigation often it is the former. Suppose we had before us a suit by uninjured prisoners at the County Farm, seeking to enjoin the supervisors and the superintendent from compelling them to work under the muzzles of loaded shotguns in the hands of ignorant and uninstructed guards. We think the case would fall well within the precedents cited and therefore that the real difficulty is not with the definition of "cruel and unusual punishment" but with the more novel problem of assessing personal tort liability when a breach of the Eighth Amendment has occurred and injury has resulted.

The evidence herein as to beating of juvenile and adult prisoners and the use of a trusty guard previously convicted of assault with intent to kill, come into focus with the demonstrated indifference to prisoners' safety, as establishing a cruel state of mind which with physical harm and causation provide the basis of Eighth Amendment tort liability. So far we speculate, but we do not mean to decide cases not before us: what we hold is that whatever the proper definition of a cruel and unusual punishment, the trial judge rightly decided that this case was within it.

We think that our discussion so far provides an answer to Arterbury's contention that the complaint should have been dismissed for failure to state a Federal claim. We also refer defendant to the opinion of

this court in *Des Iles* v. *Evans*, 200 F.2d 614 (5th Cir. 1952), p. 615:

> * * *. As stated by Professor Moore, "the courts have ruled time and again that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." 2 Moore's *Federal Practice*, 2nd Ed., Sec. 8.13, p. 1653.

If we are mistaken in our analysis of the application of the Eighth Amendment to this case as decided on the evidence, there can be no doubt that plaintiff believed, and alleged, that the injury was purposely inflicted, instead of negligently as the fact proved to be. Only the trial of the case itself established that it was not willfull. Federal jurisdiction is established by the good faith allegations of the complaint, not on the facts as they turn out. *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103 (1933).

We deal finally with Arterbury's contention that it was error for the District Court to reach the state law question under the doctrine of pendent jurisdiction because "the issue of liability on the Federal claim involves a much broader factual situation." The controlling case is, of course, *U. M. W.* v. *Gibbs*, 383 U.S. 715 (1966), and the classic statement of Justice Brennan is found at page 725:

> * * *. The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co.* v. *Morrin*,

> 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. (Emphasis in original).

Here the plaintiff has suffered but one injury, with but one causative set of operative facts. This injury and the circumstances which caused it are actionable under both Federal and state laws. This is indeed, a "case where two distinct grounds in support of a single cause of action are alleged." *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933). In the instant case, once the plaintiff has proved a prima facie case for his Federal claim, he need prove no other facts to show liability of the defendant under state law, and vice versa, as to Arterbury. The allowance of pendent jurisdiction in these circumstances is in keeping with the policy of "judicial economy, convenience and fairness to litigants," *U. M. W.* v. *Gibbs*, *supra*, at 726, and well within the discretion of the trial court.

II

Liability of the Individual Members of the Board of Supervisors

The plaintiff has cross-appealed from the District Court's holding that the individual members of the County Board of Supervisors were protected from suit by the doctrine of immunity under both the Federal and state claims.

Plaintiff contends that under Mississippi law, the Board was charged with an affirmative duty to adopt proper regulations for guarding and safekeeping of county prisoners. Miss. Code Ann. § 7904 provides:

> In any county where it is clearly more advantageous to the county to work the county convicts or some of them on the public roads of the county, or on other works of the county exclusively public in their character, the board of supervisors shall have the authority so to order, and in such cases the *board shall establish all proper regulations for the working, guarding, safekeeping,* clothing, housing and subsistence of convicts while so working, and shall provide all the necessary equipment for such purpose. And the board shall establish regulations for the discipline of convicts on said works, and on county farms, when a convict is persistently idle or refractory, and may enforce such regulations by penalties. (Emphasis supplied.)

In fact, the Board issued no order nor established any regulations whatsoever, but merely acquiesced in the manner in which the practice was carried on by Arterbury and his predecessors. This failure of the Board to comply with the statute, according to plaintiff, constitutes "gross nonfeasance" and renders the Supervisors, individual members of the Board, liable in damages. The argument is that the Board may have had discretion in what type of regulations to issue, but it had no discretion not to issue any regulations at all. The statute is directory and in this regard, plaintiff says, provides a *ministerial* rather than a

discretionary function. The court below, after a thorough review of Mississippi case law came to the following conclusion, 302 F. Supp. at 983:

> While many courts draw a distinction, as would plaintiff, between personal responsibility of a board member for the nonperformance of a ministerial duty, and no liability for failure to perform discretionary duties, that distinction does not appear to obtain in Mississippi, in respect of private suits to redress an individual wrong. * * *

The trial court noted that since the operation of jails and workhouses was a *governmental* rather than a *proprietary* function, there could be no tort liability against the county or the Board as an entity. *Jones* v. *City of Amory*, 184 Miss. 161, 185 So. 237 (1939). Also since Arterbury was the agent of the county, not of the individual Board members, the doctrine of *respondeat superior* was not applicable. *Jackson* v. *Gordon*, 173 Miss. 759, 163 So. 502 (1935). He found the controlling rule in *Wray* v. *McMahon*, 182 Miss. 592, 182 So. 99 (1938), where the Mississippi Supreme Court said:

> * * * a governmental board or council, in the discharge of the duties imposed by law upon the board or council as such, acts in an official, and not in any individual capacity; and any neglect or failure in the exercise of its powers or in the discharge of its duties is the default of the board and not of the individuals composing it, and they are not liable for such neglect or default unless expressly made so by statute. * * *

Plaintiff is unable to cite us to any statute which imposes liability here but directs us to certain language found in *Walton* v. *Colmer*, 169 Miss. 182, 147 So. 331 (1933), that "where acts are ministerial, there is liability for nonperformance of duty as well as for improper performance of duty." That case, however, is distinguishable because it was a suit brought by the District Attorney for the benefit of the county and not a suit for private benefit. Plaintiff also relies on *Stokes* v. *Newell*, 174 Miss. 629, 165 So. 542 (1936). In *Stokes*, the plaintiff had a valid contract of employment with the outgoing board of trustees, to serve as a school principal for the coming year. The incoming board refused to take the necessary ministerial action to have her put on the payroll and refused to allow her to work. The court, holding that the individual trustees were liable, said at p. 545:

> * * * the trustees breached their duty to the plaintiff, appellee here, and became liable for such damages as flowed from such breach of duty to her. * * *. A board, within the scope of its authority and powers under the law, binds the public for whom the board acts. Rights accrue to persons dealing with a board of trustees when it has acted within the scope of its authority, and these rights cannot be legally ignored. * * *

While this case seems to support plaintiff's position, it is significant that all cases which have followed it have involved individuals with vested contract rights, and usually proceeded on a mandamus action. No case has been cited where the duty involved arose not from

a contract but from a statute. In any event, the more recent case of *People's Bank Liquidating Corp.* v. *Beashea Drainage Dist.*, 199 Miss. 505, 24 So. 784 (1946), cited by the court below would seem to settle the issue here in favor of the board. In that case, the drainage commissioners were held not liable to the bondholders when they failed in their ministerial duty to assess certain lands to secure the bonds. The court said that liability would not lie even "where a member of a board personally joins in and lends his efforts towards the accomplishment of the wrongful acts of the body or board itself as an entity." We agree with the trial judge that action against the Supervisors is not maintainable under Mississippi law.

It does not follow, however, that a suit against them under 42 U.S.C. § 1983 must be likewise halted, without regard to whatever breach of duty they may have committed in the premises. It seems neither fair nor reasonable to construe this exercise of overriding Federal power, § 1983, in such a way as to assess liability on a mere underling, loyally carrying out his superior's orders, and to shield parties at whose deliberate fiat or decree the deprivation of lawful rights may have acually occurred, nor does it further the purpose of the Act. Under common law, it is true, high Federal officials acting under color of Federal law, in the exercise of their discretionary functions, enjoy absolute immunity against tort liability. *Barr* v. *Matteo*, 360 U.S. 564 (1959); *David* v. *Cohen*, 407 F.2d 1268 (D.C. Cir. 1969); *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964). In *Norton*, however, we

intimated that the immunity of state officials under 42 U.S.C. § 1983 "may be given more limited application," p. 861, and in *Anderson* v. *Nosser, supra,* this circuit refused to allow immunity under state law to the officials involved, with respect to their § 1983 liability. There is authority in other circuits that the personal immunities under § 1983 of state or local officials, not judges or legislators, cannot be decided solely by reference to local law. *McLaughlin* v. *Tilendis,* 398 F.2d 287 (7th Cir. 1968); *Nelson* v. *Knox,* 256 F.2d 312 (6th Cir. 1958).

However, we agree with the trial judge in his further holding (p. 985):

> * * *. In the final analysis, plaintiff cannot point to any individual act of a supervisor as having a causal relation to the subject matter of this litigation and the personal injuries sustained by plaintiff, * * *.

except that for "individual act" we would substitute "individual breach of duty." *McLaughlin* v. *Tilendis* and *Nelson* v. *Knox,* would allow a qualified immunity based on good faith performance of duty as the officials understood it. As to the onerous burden on a plaintiff under § 1983 to satisfy that standard, see Magruder, C. J.'s concurrence in *Cobb* v. *City of Malden,* 202 F.2d 701, 705 (1st Cir. 1953). Chief Judge Bazelon of the D. C. Circuit would abolish any absolute immunity for officials exercising discretionary functions and instead would treat

> the degree of discretion available to Government

> officials in performance of their office and the public interest in protecting the exercise of that discretion as among the "circumstances of the action" to be considered. [Footnotes omitted]. Concurring, in *Elgin* v. *District of Columbia*, 337 F.2d 152, 157 (1964).

We think the Supervisors are in any event not liable for a good faith, reasonable choice among valid policy alternatives, even if an unwise one, and that liability for their negligence will follow only when the plaintiff can show a clear breach of duty that led to the plaintiff's injury.

In considering what breach of duty the Supervisors might have committed, we need not remand for additional findings because the facts concerning their performance are undisputed.

According to plaintiff, the answer is very simple. They were to make regulations and they made none. Thus it would follow from this standard: if they made regulations they would be exonerated even though such supposed regulations said nothing about instructing guards in the use of firearms. This is absurd. If we say they have breached their duty by failing to regulate on that special subject, we confront the fact that they were the governmental body responsible for managing all the county business. The state could not have expected them to be specialists on penology, and they could not have been. Therefore, it was not reasonable to require them to instruct Arterbury on all the details of his business. They were to hire a "com-

petent and suitable person" who was to be presumably already knowledgeable how to run a prison farm. Whatever the regulations were to be, it does not seem they had to deal with matters Arterbury should have understood better then they did. The statute is not all that specific. It was Arterbury, not they, who as an experienced penologist knew or should have known of the paramount importance of instructing a guard in detail how to handle safely the firearm that was entrusted to him. The trial judge was not expected to take judicial notice of this: expert testimony was offered. Were the Supervisors expected to know more than the judge? There was no history of prior accidental shooting of prisoners by trusty guards that might have alerted the Supervisors.

It would have been most helpful to us to have placed in evidence examples of Regulations promulgated by the Supervisors of other Mississippi counties. These would have shown us what the legislature of the state had in mind in demanding Regulations. If any of such examples had anything in them about instructing guards in the use of firearms, it would have been compelling. In the absence of such showing, we are left to guess and speculate what such Regulations are like, and our guess is they contain nothing on the subject.

All five Supervisors visited the County Farm frequently and all used the prisoners for road repairs in their "beats." There were a number of objectionable practices and conditions at the farm of which they

were aware or should have been. These included use of a leather strap to punish prisoners, including plaintiff, mingling of juvenile and adult prisoners, and the system of using trusty guards.

The first of these was prohibited by the Eighth Amendment. *Jackson* v. *Bishop, supra.* But plaintiff is not suing any more for the discipline he received; at any rate the trial judge's failure to make findings with respect to it, or award damages for it, is not assigned here as error.

The assignment of juveniles to an institution without separate facilities for them was apparently the responsibility of the sentencing judge, who was sued but dismissed from the action on the basis of absolute immunity. In fairness to him it should be said that by his testimony, the state institutions suitable to receive plaintiff all had waiting lists, and plantiff's father told him plaintiff was uncontrollable and could not be taken back into the home. Plaintiff and his father seemingly consented to his being sent to the County Farm, though plaintiff had been there before and should have known what it was like. If the judge was absolutely immune, it may seem strange that he was haled into court and required to account for his actions, but so it was. His testimony is helpful towards an understanding of the background of the case and the conditions with which the remaining defendants had to cope. Arterbury was not even notified the age of juveniles sent to him.

The trusty guard system *per se* was much excori-

ated in the testimony, and undoubtedly the Supervisors must take responsibility for it. However, its use falls, we believe, outside the ambit of a clear breach of a legal duty. At least one other Mississippi county used it, and some other states. There is no evidence to show that in tolerating or approving it, the Supervisors did not act in good faith and exercise their best judgment, however faulty. The trier of fact found no proof the system was injurious to prisoners' welfare. Despite the opinion testimony the most objectionable feature of the system, in actual experience, was the carelessness of trusty guards in allowing prisoners to escape. There was no history of their accidentally shooting prisoners.

The decision in *Holt* v. *Sarver, supra,* is not contrary to our trial judge's conclusion because the Arkansas trusty guard system, there involved, went a great deal further than the Mississippi one as displayed in evidence herein. The trial judge, at p. 373, said it was "*sui generis.* The trustees run the prison." He went on that they performed many administrative tasks, had access to other prisoners' records, and had control over the granting or withholding of concessions and privileges to ordinary prisoners. Williams had no powers like these. In holding that the system was "cruel and unusual punishment," moreover, since the suit was for injunction and declaratory judgment, the court there did not have to go on and assess tort liability against anyone.

Even if—as we do not hold—toleration of the sys-

tem was *per se* a breach of duty, there is no basis for a finding that the Supervisors might have foreseen it would create a hazard of accidental shooting. *Cf. Palsgraf* v. *Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). The trial judge's findings assign the cause of the catastrophe to the failure to train Williams in the safe use of his firearm, and this is a failure in something the Supervisors had a right to expect Arterbury to know the need of. Evidently a paid non-convict guard would be as dangerous as Williams if likewise untrained. In holding there was no evidence of a breach of legal duty by the Supervisors that led to plaintiff's injury, we do not wish to be understood as awarding them any accolade, for they are indeed fortunate that the cause of the catastrophe was shown to be what it was. By Judge Bazelon's criterion, the public has an interest in safeguarding them against being mulcted for honest mistakes, and catastrophes not caused by their breaches of duty. Plaintiff's eloquent counsel would have them provide the finest county farm that money could buy, or bear the pecuniary consequences of any mishap. No one would wish to serve as a County Supervisor under such a system of law, and the job, like prefectships in the declining days of the Roman Empire, would have to be thrust upon unwilling honorees.

III

Damages

The District Court awarded plaintiff a judgment in the amount of $85,000 against defendant Arterbury. Plaintiff contends that the amount is "grossly

inadequate." Arterbury made no argument on this issue and apparently stands on the opinion of the court below.

From the evidence presented, the court found that plaintiff would be totally disabled throughout his life expectancy of 49 years, and had been deprived of his ability to earn a living. In this regard, the court found it "reasonable to conclude that, upon attaining his majority, plaintiff would have been able to perform ordinary employment, qualifying him for minimum wages under a 40 hour week." The court also found that:

> * * * plaintiff has experienced great physical pain and suffering and also untold mental agony, embarrassment and humiliation; and he will indefinitely continue to endure both physical suffering and mental anguish. His incapacity borders upon personal helplessness in many ways and he will require, for an indeterminate period of time, special care and assistance from others who are entitled to be reasonably compensated for their service. * * *. 302 F. Supp. at 990.

Not only was plaintiff totally blinded but he was handicapped in learning braille by his other injuries. It is plaintiff's position, with which we agree, that the amount of damages awarded indicates that the trial judge based the award solely on the discounted value of the loss of future earnings at the minimum wage rate. We think that $85,000 represents a minimal recovery for that element alone, leaving nothing for the "great physical pain and suffering and * * * untold

mental agony, embarrassment, and humiliation," nor for his "personal helplessness" requiring the paid services of others. As we said in *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1042 (1969):

> * * *. Obviously, some reasonable allowance has to be made for the other * * * elements. Without even so much as intimating what the awards should be, and certainly not as to awards in other cases * * *, we think this should be reconsidered by the District Judge on the present record with whatever further supplement is appropriate. * * *

There was no evidence of plaintiff's medical and hospital bills up to the time of trial and the trial judge surmised the county may have paid them, (his fn. 33, p. 990, *supra*). He was cared for up to then in various public institutions. There was expert medical testimony removing from the realm of speculation or surmise what plaintiff's future life will be like. Award for pain and suffering and related matters must obviously be in the nature of a "jury verdict" and detailed substantiation is never possible. Therefore, we think the existing record furnishes substantial evidence to support an award for pain and suffering, but the trial judge can supplement it if he deems it to be appropriate to do so. *Grigsby, supra.* At any rate we remand for reconsideration of the amount of damages.

In summary, we affirm the judgment against Arterbury both under state law and under 42 U.S.C. §

1983. We affirm the dismissal of the complaint as against the five members of the County Board of Supervisors, both under state law and under 42 U.S.C. § 1983, but sustain the cross-appeal as to the amount of damages, and remand for further consideration of that issue.

SIMPSON, Circuit Judge, specially concurring:

I concur in the result because I agree that the district court's judgment should be affirmed on the pendent state tort claim asserted by the plaintiff. The plaintiff in good faith filed a facially sufficient Title 42, U.S.C. Section 1983 claim alleging that the defendants under color of state law had violated the civil rights of the plaintiff by the intentional infliction of bodily injury. The district court had jurisdiction to entertain any pendent state claims which arose out of the same circumstances. *United Mine Workers* v. *Gibbs*, 1966, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218. The jury was justified in holding Arterbury in damages under Mississippi law and the trial court correctly approved the verdict awarding damages against him. I would affirm the judgment on this sole basis.

I disassociate myself from the portion of the majority opinion which posits liability on the cruel and unusual punishment clause of the Eighth Amendment, which provides ". . . nor cruel and unusual punishments *inflicted*." My view is that as a matter of law the plaintiff failed to make out a case for violation

of the Eighth Amendment. Punishment is the first element of "cruel and unusual punishment." Absent punishment an act however cruel and unusual may not be transmogrified into "cruel and unusual punishment." The essence of punishment is the intentional infliction of penalty or harm upon another. At the very least punishment comprises conduct so grossly negligent that intent may be inferred from its very nature, applying the concept that a person intends the natural consequences of his acts. I find neither of these elements present in this case. Further, if we say that conduct is present which may be tortured into fitting some definition of punishment that conduct must be cruel and unusual. Conceding that the injuries suffered by the plaintiff here were most grievous in nature — as they certainly were — they were no more cruelly and unusually inflicted than are similar serious injuries suffered at the hands of any other negligent tortfeasor. Here again, I think that the word "inflicted" is used in the Eighth Amendment to denote an intentional act, not a negligent injury.

My strongly held view then, with all deference to my brothers, is that in basing liability on the Eighth Amendment as well as on state tort grounds, the majority goes beyond anything that requires decision in this case, and does it by an unwarranted extension of precedents of doubtful value. I take particular exception to the use to which the majority puts this Circuit's opinion in *Whirl* v. *Kern*, 5 Cir. 1969, 407 F.2d 781, cert. denied 396 U.S. 901. I considered *Whirl* to

be unsound when it was published, as evidenced by my dissent from the denial of rehearing en banc. The extension of its teachings to cover the situation presented by the instant case graphically illustrates the basis of my original misgivings about the wisdom of the decision.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 28829

D. C. Docket No. GC 6635-K

ARTHUR ROBERTS, BY HIS FATHER AND GUARDIAN, EDDIE W. ROBERTS,
Plaintiff-Appellee-Cross-Appellant,

versus

COLUMBUS WILLIAMS, Individually and as Trusty at the LEFLORE COUNTY FARM, ET AL.,
Defendant-Appellant-Cross-Appellees,

JOHN ARTERBURY,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

Before RIVES and SIMPSON, Circuit Judges, and NICHOLS, Judge of the Court of Claims.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

* Sitting by designation as a member of this panel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to the judgment against Atterbury and the dismissal of complaint as against the five members of the County Board of Supervisors; and that this cause be, and the same is hereby affirmed and remanded to the said district court for further consideration on the cross appeal as to the amount of damages.

It is further ordered that defendant-appellant-cross appellee pay to plaintiff-appellee-cross-appellant and defendants-cross appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1971

SIMPSON, Circuit Judge, specially concurring.

Issued as Mandate:

APPENDIX C

Arthur ROBERTS, by his Father and Guardian,
Eddie W. Roberts,
Plaintiff,

v.

Columbus WILLIAMS, indiyidually and as Trusty
at the Leflore County Farm, et al.,
Defendants.

No. GC 6635-K.

United States District Court
N. D. Mississippi,
Greenville Division.

July 30, 1969

OPINION

KEADY, Chief Judge.

In this § 1983 action, plaintiff, Arthur Roberts, a 14 year old Negro suitor, sues for monetary damages upon four causes of action set forth in his complaint.[1] The first cause of action, here detailed to

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[1] 42 U.S.C. § 1983, provides that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

While plaintiff and all defendants were, at the time suit was instituted, residents of Leflore County, Mississippi, fed-

state plaintiff's basic claim, may be summarized as follows: On April 15, 1965, defendant Gray Evans, who held office as prosecutor for the City of Greenwood, Mississippi, but in this instance acting specially as Municipal Judge, heard a charge of petty larceny against plaintiff, convicted him of the offense, and gave him a 90 day jail sentence, prior to entry of an order of the Youth Court Division of the Leflore County court or notice to his parents, and in violation of his federal constitutional rights. On April 19, 1965, defendant Charles Pollard, Youth Court Judge, allegedly conducted a hearing at which plaintiff's parents were present, but not plaintiff, and upon recommendation of defendant Charles Deaton, the Court's Youth Counsellor, ratified the conviction and sentence imposed by defendant Evans, knowing same to have been violative of the Youth Court Act.[2] On June

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eral jurisdiction is unaffected, for diversity of citizenship is not a jurisdictional requisite in Section 1983 actions. Jackson v. Martin, 261 F. Supp. 902 (N.D. Miss. 1966); see also Walton v. City of Atlanta, 181 F.2d 693 (5 Cir. 1950), cert. den. 340 U.S. 823, 71 S. Ct. 56, 95 L. Ed. 604; 28 U.S.C. § 1343, Annot. 5.

[2] Miss. Code Ann. § 7185-16 (Supp. 1968), provides, in pertinent part, as follows:

> "Whenever any child thirteen (13) years of age or older is brought before any justice of the peace court or municipal court charged with the commission of a misdemeanor under a state law or municipal ordinance, such court shall, unless prosecution is permitted by order of the youth court, transfer the case to the Youth Court of the county, to be dealt with as a case of delinquency in accordance with the provisions of this act * * *."

Miss. Code Ann. § 7185-06 (Supp. 1968), provides that:

> "[T]he [Youth Court] judge shall fix a date and designate a place for the hearing of the case concerning said [allegedly delinquent] child, and shall order the clerk of the court to issue summons to the person having the cus-

28, 1965, while serving his sentence at the Leflore County Farm to which he had been transferred from the city jail, plaintiff was injured from a shotgun blast into his face, which gun he charges was intentionally or negligently discharged by Columbus Williams, a Negro and also an inmate of the county farm, who was serving as an armed trusty.[3] Also sued as defendants were John Arterbury, Superintendent of the Leflore County Farm, the members of the Board of Supervisors of Leflore County,[4] County Sheriff George W. Smith, and Fidelity and Deposit Company, Sheriff's official surety. Arterbury is specifically alleged to have appointed Williams to the position of trusty at the County Farm, knowing of his reputation for violence, and the Supervisors are allegedly charged under Mississippi law with responsibility for the supervision and management of the Leflore County Farm. These acts are jointly and severally charged

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tody or control of the child, requiring such person to appear personally and bring the child before the court at the time and place stated * * *."

Miss. Code Ann. § 7185-16 (Supp. 1968), provides that:

"After conviction and sentence of any child * * * prosecuted for a misdemeanor * * * by a justice of the peace or municipal court, the Youth Court of the county shall have full power to stay the execution of such sentence and to release such child on good behavior, or other such order as the court may see fit to make."

[3] Columbus Williams was also sued as a defendant but personal process was never had upon him and the case went to trial accordingly. His deposition was taken in Chicago, Illinois, by plaintiff's counsel and will be later referred to.

[4] The Leflore County Supervisors, each sued individually and in official capacity, are: Ulysses F. Smith, W. J. Lipscomb, Robert H. Swanzy, James D. Green and James M. Hooper, Jr.

to have violated plaintiff's rights under the laws and Constitution of the United States.

[1] The aforementioned allegations are also incorporated into a second cause of action charging a common law assault and battery, into a third cause of action charging negligence of all defendants other than the official surety, and into a fourth cause of action charging false imprisonment. Although these claims standing alone would not be cognizable here for lack of diversity of citizenship between all plaintiffs and all defendants, they so closely relate to the § 1983 action that they are within the ancillary or pendent jurisdiction of this court. See Hurn v. Oursler, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933); 28 U.S.C. § 1338(b).

[2] On March 31, 1967, Circuit Judge Claude F. Clayton, then District Judge, granted summary judgment in favor of Pollard and Deaton on the ground of judicial immunity and they were dismissed from the suit.[5] Motion for summary judgment was overruled as to the defendant Evans. The court overruled Arterbury's motion to dismiss for failure to state a claim on the first three causes of action but said motion was sustained as to the fourth.[6] Defendant

[5] See Memorandum Opinion Dated March 31, 1967, citing, among other authorities, Pierson v. Ray, 5 Cir., 352 F.2d 213 (1965); Robichaud v. Ronan, 351 F.2d 533 (9 Cir. 1965); Kenny v. Fox, 232 F.2d 288 (6 Cir. 1956); and Tate v. Arnold, 223 F.2d 782 (8 Cir. 1955).

[6] Judge Clayton's Memorandum Opinion concluded that the allegations that Arterbury, acting under color of state law, deprived plaintiff of privileges of immunities secured to him by the Fourteenth Amendment, sufficiently state a federal

Smith, the County Sheriff, and his official surety were also granted motion for summary judgment, which was not opposed by plaintiff. A motion to dismiss filed by the members of the Board of Supervisors was deferred until trial.

A three-day trial on the merits commenced February 18, 1969, and developed the following facts: On the afternoon of April 14, 1965, plaintiff was arrested on a charge of petty larceny and was taken to the Greenwood City Jail, where he remained overnight awaiting trial. The next morning he was taken before Charles Pollard, Judge of the Youth Court, who conducted a hearing in the presence of plaintiff and his father, Eddie Roberts, and determined that plaintiff, having been in Youth Court on a prior occasion and transferred for ordinary criminal prosecution, should be tried for misdemeanor in city court. In accordance with custom, city court officials were at once notified by telephone of the action taken by the Youth Court.[7]

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claim under § 1983. See Monroe v. Pape, 365 U.S. 167, 168, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Causes of action two and three for damages resulting from defendant Williams' alleged assault and battery on the plaintiff state a claim under state law, as an official or employee of a county having custody of prisoners is liable for knowingly or negligently permitting them to be abused. See Farmer v. State, 224 Miss. 96, 79 So. 2d 528 (1955); Miss. Code Ann. § 7915 (1942 Recomp.). He is not liable, however, for false imprisonment, as state law imposes no duty upon him, as County Farm Superintendent, to inquire into the validity of a state court sentence.

[7] On January 5, 1965, an initial youth court petition had been filed against plaintiff for breaking and entering Mississippi Valley College and stealing a bicycle, and all statutory formalities had been complied with, resulting in the transfer of plaintiff to justice of the peace court for criminal prosecution. After Judge Pollard made his determination on the morning of April 15, 1965, that plaintiff should be prosecuted in

That afternoon at the city court trial, which was also attended by Eddie Roberts, plaintiff entered a plea of guilty before Gray Evans, Acting City Judge.[8] The court accepted plaintiff's guilty plea and sentenced him to 90 days' imprisonment. Pursuant to city-county agreement, plaintiff was shortly thereafter transferred from city jail to the Leflore County Farm for serving his sentence. At the time of this transfer, a detention warrant, advising nature of the conviction and sentence imposed but giving no other information, was delivered to the farm superintendent.

The Leflore County Farm, maintained by the County Board of Supervisors, pursuant to statute, consisted of certain farm acreage and a dormitory styled building called the "cage," which usually housed about 25 to 30 county convicts serving prison sentences. The administration of the farm was under defendant Arterbury, an experienced law enforcement officer, who had had at the time of the incident more than 18 years of service as either superintendent or assistant superintendent. In accordance with their

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the city court, the court officials made certain entries that date on the Youth Court docket, which were erased after a de cision was reached between Charles Deaton, Youth Court Counselor, and the court clerk that "for bookkeeping purposes" a supplemental petition should be filed. This was done on April 16, process had on plaintiff's father and order entered April 19, 1965 transferring case. There was, in fact, no hearing on April 19, the only hearing having occurred on April 15, but no formal judgment was signed by the judge of the youth court prior to April 19.

[8] Evans had been serving as pro tem. Judge since 1962 by virtue of a continuing order effective when the regular judge was out of the city and he sat in that capacity several times each month.

practice, the Supervisors had rehired Arterbury from year to year as he had performed his work satisfactorily and was regarded as a competent administrator and a person of good judgment. The inmates at the county farm work out their sentences on the farm or, as may be determined by the Board of Supervisors, on the public roads or other public works in the county. For a period of many years, the Supervisors had, if not by formal order, acquiesced in an approved use of the farm prisoners as road gangs performing work on the county roads, bridges and public cemeteries, which was alternated weekly among the five Supervisors' districts and carried out under the direct supervision of a road foreman. During that period of time there had developed, with the Board's knowledge and approval, a trusty system by which certain inmates, selected by Arterbury, were accorded special privileges and responsibilities and some of whom were used as armed guards or "shooters," carrying loaded guns when guarding prisoners out "on the line" doing road work away from the farm. In some instances Arterbury, receiving authority from the Board, hired outside personnel as armed guards. Columbus Williams, a 23 year old Negro with a 4th grade education, serving time for conviction of the offenses of assault and battery with intent to kill and petty larceny, had been chosen by defendant Arterbury as an armed guard. For this purpose, Williams had been daily furnished a 12 gauge pump shotgun and a quantity of shells containing 7½ shot. On June 28, 1965, plaintiff was detailed as a member of a

work crew in Beat 5 near Minter City, and Williams was guarding the prisoners. Shortly before noon, the road foreman departed the work site, leaving Williams in charge, and the work crew stopped for lunch at a county-owned barn. As the plaintiff, after lunch, was resting on the ground not more than 50 feet from the barn entrance where Williams stood guard, and in his plain view, Williams, then having the shotgun cradled under his right arm, caused it to discharge directly into plaintiff's face, causing his blindness in both eyes, brain damage and other injuries resulting in total and permanent disability.[9] Admittedly, at the time of the shooting Williams had the shotgun loaded with 5 shells, one of which was in the firing chamber, ready to shoot in accordance with his instructions, and the safety was off. The shotgun could not have been discharged with the safety on, as it was in good working order. There is no evidence that Williams stumbled or dropped the gun or suddenly knocked the safety off. Williams was unable to give a satisfactory explanation of why the gun discharged and he failed to check the safety mechanism after its discharge.

[9] There is no dispute concerning plaintiff's injuries. He was immediately taken to Leflore County Hospital, rushed to University Hospital at Jackson, Mississippi, for emergency treatment, and sent back to Leflore County Hospital, where he remained until August 1965. Later, under special hospital care at Vicksburg, he spent approximately three months learning to walk with a cane, to read braille and perform other services. On March 4, 1967, he enrolled in the Mississippi School for the Blind, having completed the 9th grade at the time of trial. Complete blindness has resulted with recurring headaches and occasional fainting spells. He is handicapped in the reading of braille by inability in use of his arms. Medical evidence indicates he has suffered brain injury from the accident and, with a life expectancy of 49 years, he will be wholly incapacitated.

Although plaintiff suggests that the shooting was deliberate and done to satisfy a grudge, no witness actually saw Williams in the act of pulling the trigger and all present observed his apparent shock and grief over the shooting. Necessarily, however, Williams was grossly negligent in the handling of the loaded weapon, knowing that it was ready for instant firing with a shell in the chamber and nonetheless pointing it in the direction of plaintiff who was in full view, without making certain that the safety was on, or without examining the gun to determine whether the safety might have become disengaged through previous handling. Arterbury had selected Williams as a shooter because "he was obedient, did his work right and never gave me any trouble." This occurred several months after Williams had arrived at the farm as an inmate, and Arterbury was familiar with the fact that Williams had been a sheriff's trusty while at the county jail. He ascertained, on casual inquiry, whether Williams knew how to handle and use a shotgun, and he relied upon Williams' telling him that his father had taught him how to use a gun as he had often hunted as a child. Arterbury gave Williams only the briefest instructions concerning the use of the gun, telling him "to be careful." There were no meaningful demonstrations by Arterbury or his assistants to teach Williams the use of the gun or its safe handling, or to make certain that he was competent for guard duty. Specifically Williams was not instructed, at all costs, never to point the shotgun in any direction or at any object at which he was not ready to

fire, nor was he instructed to, at all times, examine the safety to determine that it had not become dislodged. But Arterbury did instruct Williams to inject a shell into the firing chamber whenever the work crew had reached the area where guard duty would commence. So far as is known, prior to the shooting, Williams had never shot the gun in target practice, nor had he at any time received expert instruction as to its care and handling. He, thus, remained ignorant as to proper safety practices in handling the gun although being entrusted with it and he allowed it to discharge under wholly unnecessary and grossly careless circumstances, so as to maim plaintiff for life, without any cause or provocation.

I

JUDICIAL IMMUNITY OF GRAY EVANS

[3] Plaintiff's case for § 1983 liability against defendant Evans for his acts as pro tem. Municipal Court Judge[10] rests primarily upon the contention that Evans may not claim judicial immunity because the city court was utterly without jurisdiction to impose sentence; and in this respect plaintiff relies upon state statutes vesting jurisdiction in the Youth Court.[11] It is a firmly established principle that a

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[10] Complaint charges Evans with the following alleged violations of plaintiff's constitutional rights: illegal confinement; acting as both judge and prosecutor; failing to advise plaintiff of his right to counsel; and subjecting plaintiff to the infliction of cruel and inhuman punishment.

[11] The Mississippi Youth Court Act, Miss. Code Ann. § 7185-01 et seq., provides in relevant part as follows:

judge is protected from civil liability for acts done in excess of the jurisdiction of his court or which are alleged to have been done maliciously or corruptly. Bradley v. Fisher, 13 Wall. (80 U.S. 335), 20 L. Ed. 646 (1871). The only exception to nonliability was for an act done in "the clear absence of all jurisdiction over the subject matter."[12] Expressly holding that the doctrine of judicial immunity was unaffected by the passage of § 1983 and was applicable to all judges, including municipal court judges, the United States

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"§ 7185-03. Jurisdiction.—Except as otherwise provided herein, the court shall have exclusive original jurisdiction in all proceedings concerning any delinquent or neglected child residing or being in the county." (No exceptions are here applicable).

"§ 7185-04. Retention of jurisdiction.—When jurisdiction shall have been obtained by the court in the case of any child, jurisdiction of such person as well as of any offenses by him committed may be retained or resumed by the court until he becomes twenty years of age. * * *"

"§ 7185-16. Transfer of misdemeanor cases from other courts unless prosecution permitted by youth court.—Whenever any child thirteen years of age or older is brought before any justice of the peace court or municipal court charged with the commission of a misdemeanor under a state law or municipal ordinance, *such court shall, unless prosecution is permitted by order of the youth court, transfer the case to the youth court of the county, to be dealt with as a case of delinquency in accordance with the provisions of this act*, * * *. After conviction and sentence of any child so prosecuted for a misdemeanor, as above set out, by a justice of peace or municipal court, the youth court of the county shall have full power to stay the execution of such sentence and to release such child on good behavior, or other such order as the court may see fit to make." (Emphasis added).

[12] In Bradley v. Fisher, supra, at page 651, the Court said:

"Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

Supreme Court reaffirmed the rule of *Bradley* in Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). By the rule of this case, the civil liability of a judge exceeds the bounds of immunity only when done in "clear absence of all jurisdiction over the subject matter." The wisdom for faithfully adhering to this rule is obvious. "It is a judge's duty to decide all cases * * * before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." Pierson v. Ray, supra, 87 S. Ct. at 1218, 18 L. Ed. 2d at 294.[13]

The doctrine of judicial immunity is fully recognized in Mississippi. Bell v. McKinney, 63 Miss. 187 (1885); DeWitt v. Thompson, 192 Miss. 615, 7 So. 2d 529 (1942).

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[13] As Judge Learned Hand observed in Gregoire v. Biddle, 177 F.2d 579, 580-581 (2 Cir. 1949):

> "* * * [judicial] immunity is absolute and is grounded on principles of public policy. The public interest requires that persons occupying such important positions * * * should speak and act freely and fearlessly in the discharge of their important official functions.
>
> * * * *
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> "There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. * * * [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

[4] Under the foregoing cases, Evans stands absolved from any civil liability to plaintiff, because he did not act with utter lack of subject matter jurisdiction. Plaintiff had been arrested for committing petty larceny, a violation of municipal law, and he was booked and jailed in city court on that charge. Admittedly, Evans had the legal authority to act as city judge; and plaintiff appeared in court and pleaded guilty to a criminal offense. Plaintiff's attack upon existence of subject matter jurisdiction rests entirely upon the absence of a written judgment of transfer by the Youth Court signed, entered on file at the time of the city court trial. Yet there can be no doubt that Youth Court Judge Pollard had exercised his continuing jurisdiction over plaintiff at a hearing actually conducted prior to the trial in city court, and a valid determination had then been made by the Youth Court consenting to plaintiff's prosecution. The statutes relied upon by plaintiff were substantially complied with. The mere fact that formal judgment was not entered until April 19, four days after the city court trial, does not nullify the city court's jurisdiction nor invalidate plaintiff's conviction and sentence. § 7185-16 stays the hand of the city court "unless prosecution is permitted by *order* of the youth court." An "order of youth court," as that term is so used, can only be interpreted as the pronouncement of the court at the conclusion of its hearing; and the entry of a written judgment, though necessary to the completion of the record, is not a judicial, but a clerical act. The Mississippi Supreme Court in Welch v. Kroger Grocery

Company, 180 Miss. 89, 177 So. 41, 42 (1937), recognized the well-settled state law in these words:

> 'In courts of law, the judgment is rendered when the court signifies its assent to the sentence of the law as a result of the proceedings in the case, Clark v. Duke, 59 Miss. 575, 579; or, as otherwise stated, a judgment at law is the pronouncement thereof at the conclusion of the trial, Simpson v. Boykin, 118 Miss. 701, 718, 79 So. 852. The entry of the judgment is a clerical or ministerial act, to be performed by the clerk, and is not the judicial act. Cresswell v. Cresswell, 164 Miss. 871, 879, 140 So. 521, 144 So. 41. This is the rule in all common-law states, save as modified by statute; the rule being further that upon rendition, without entry, the judgment is valid and binding between the parties. See text and numerous cited cases, 34 C.J. pp. 44 et seq.'

United States v. Meredith, 172 F.2d 745 (7 Cir. 1949), cited by plaintiff, agrees with the foregoing rule in these words:

> "The court clearly advised the defendant of his sentence at the time of the hearing and this was supplemented, as in all cases, whether civil or criminal, by formal judgments entered upon the court record in compliance with what the court had directed. There is no requirement in the law that the formal sentences be reduced to final form in the presence of the defendant. His rights were fully protected by the announcement of the court in his presence."

It is to be noted that the statute does not require the order of the Youth Court to be in writing or to

be cast as a judgment before the juvenile may be proceeded against criminally. Indeed, the informality of the Youth Court proceedings and the expeditious manner in which they operate support our interpretation that Judge Pollard, in this instance, effectively released Youth Court jurisdiction over plaintiff. Moreover, by proceeding with the case prior to being presented with a written order of transfer, defendant Evans might have acted prematurely and more properly should have awaited the receipt of the Youth Court judgment before disposing of the case on its merits, as no doubt the absence of such judgment in the record of conviction would have resulted, on appeal, in its reversal and vacation of sentence. *Lee* v. State, 214 Miss. 740, 59 So. 2d 338 (1952). But it is not every judicial error requiring reversal that entitles a defendant to damages against the sentencing judge; to so hold would destroy the salutary doctrine of judicial immunity. Finally, in any event, Evans, as City Judge pro tem., was, by the very terms of § 7185-16, vested with jurisdiction to transfer the case to the Youth Court. Such an order was clearly authorized. Proceeding to trial and sentence, prior to consent of the Youth Court, would have been erroneous and in excess of jurisdiction but not altogether beyond the scope of all power to act. Indeed, Evans was not an interloper but sat as a court with power to act and at least limited authority and jurisdiction. Entry of an erroneous judgment under such circumstances would not destroy his judicial immunity. A close analogy to the case at bar may be found in Bell v. Mc-

Kinney, supra, in which Wagner, the Mayor and ex-officio Justice of the Peace having jurisdiction only as a conservator of the peace for offenses committed outside the municipality, illegally convicted and sentenced a plaintiff for a misdemeanor committed outside the municipality. The Court exonerated Wagner of civil liability for an act done in excess of his jurisdiction, and held the officer was not liable "under the circumstances for errors of judgment or mistakes of law committed in the execution of his office." To like effect is McGrew v. Holmes, 145 Iowa 540, 124 N.W. 195 (1910).

II

PERSONAL LIABILITY OF AN INDIVIDUAL MEMBER FOR THE ACT OF NEGLECT OF THE COUNTY BOARD OF SUPERVISORS.

Although plaintiff acknowledges that an action cannot lie under § 1983 against Leflore County or its governing body, the Board of Supervisors,[14] it is earnestly contended that individual board members are personally liable for the negligence of Arterbury and Williams as their agents in the operation of the coun-

[14] The cases are legion that cities and counties are not amenable to suit under § 1983. See, e.g., Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 492 (1961); Charlton v. City of Hialeah, 188 F.2d 421 (5th Cir. 1951); Hewitt v. City of Jacksonville, 188 F.2d 423 (5 Cir. 1951); Cobb v. City of Malden, 202 F.2d 701 (1 Cir. 1953); Agnew v. City of Compton, 239 F.2d 226 (9 Cir. 1956); Cuiska v. City of Mansfield, 250 F.2d 700 (6 Cir. 1957). Neither are states, Williford v. People of California, 352 F.2d 474 (9 Cir. 1965); the United States, Broome v. Simon, 255 F. Supp. 434 (W.D. La. 1965), school districts, Harvey v. Sadler, 331 F.2d 387 (9 Cir. 1964), or police departments, United States ex rel. Lee v. People of Illinois, 343 F2d 120 (7 Cir. 1965).

ty farm, and for the Board's utter failure to adopt any regulations whatsoever for the guarding of prisoners while employed on county road work. Neither of these contentions is supportable under applicable state or fedral law.

[5-7] By Mississippi law, it is "the imperative duty" of the Board of Supervisors to require convicts sentenced to imprisonment in the county jail to work out the sentence on the county convict farm or, as the Board may provide, on the public roads or other public works, Miss. Code Ann. §§ 7900-7901. It is well settled state law that in the establishment and regulation of jails and work houses, a municipal corporation acts in its governmental, and not private, capacity. Jones v. City of Amory, 184 Miss. 161, 185 So. 237 (1939), citing authorities: 41 Am. Jur., Prisons and Prisoners, § 3, p. 886. There is no tort liability upon a county, or its Board of Supervisors, in performing this basic governmental function. Moreover, assuming joint and several negligence on the part of Arterbury and Williams in the operation of the county farm, the doctrine of respondeat superior is not applicable so as to cast a personal responsibility upon individual supervisors. The Board of Supervisors is directed by statute to "employ a competent and suitable person * * * as foreman of county farm to superintend such convict farm and manage it and to work the convicts sentenced to the county jail thereon." Miss. Code § 7901. The foreman or superintendent of the county farm is the agent of the county and not that of the individual supervisors. Jackson v. Gor-

don, 173 Miss. 759, 163 So. 502 (1935).[15] This would also be true as to subordinate agents, such as Columbus Williams, selected by Arterbury in any phase of handling the prisoners. It necessarily follows that the acts of subordinate agents would not, under the doctrine of immunity in the performance of a governmental function, impose liability upon the municipal corporation for such tortious acts. See 14 Am. Jur., Counties, § 50, p. 217. Here, the only obligation upon the Board, as an entity, was to employ a competent and suitable person as foreman with authority to manage the farm and to work the prisoners; and Arterbury was a competent and suitable person so that the Board's statutory duty was fully discharged.

[8] Plaintiff presses his case against the individual members of the Board by pointing to the negligence of the Board in its failure to adopt, as required by § 7904 of Miss. Code Ann., "all proper regulations for guarding the prisoners," when they well knew and approved the use of prisoners to work on public roads,

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[15] In this case, a member of the Board of Supervisors was sued for personal injuries sustained by the plaintiff as a result of the negligence of Northern, who had been employed for the county by defendant-supervisor. Plaintiff's claim arose out of a traffic accident involving negligent operation by Northern of a county truck in the course of his duties. Rejecting liability, the Mississippi Supreme Court held:

> "In the present case the [defendant] member of the board had nothing whatever to do with the alleged wrongful act of Northern. Gordon was acting in the capacity of road commissioner for his district; Northern, although employed by Gordon acting as such commissioner, was the servant of the county and not of Gordon. The county was the principal, not Gordon."

bridges and other public jobs.[16] The evidence shows that the Board neither adopted a formal order as such to permit the county prisoners to do public work away from the farm, nor establishing any regulations whatever for guarding convicts while at work. In these respects there was a default on the part of the Board of Supervisors and a failure to comply with statutory requirement. The Board actually acquiesced over a period of many years in the use of county convicts on road and other public works, and left to the superintendent of the farm the entire matter of handling and guarding the prisoners while at work; and the members of the Board were aware that Arterbury, as county farm superintendent, would use inmates from time to time as armed trusties to guard other prisoners while away from the farm. It is asserted that because of this positive neglect by the Board in its performance of a statutory duty, individual responsibility attaches to each supervisor. On the other

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[16] Miss. Code Ann. § 7904, provides:

"§ 7904. Convicts may be worked on public roads or other county public works.

In any county where it is clearly more advantageous to the county to work the county convicts or some of them on the public roads of the county, or on other works of the county exclusively public in their character, the board of supervisors shall have the authority so to order, and *in such cases the board shall establish all proper regulations for the working, guarding,* safekeeping, clothing, housing and subsistence *of convicts while so working,* and shall provide all the necessary equipment for such purpose. And the board shall establish regulations for the discipline of convicts on said works, and on county farms, when a convict is persistently idle or refractory, and may enforce such regulations by penalties." (Emphasis added)

hand, each supervisor pleads an immunity on two grounds: first, that a suit against them is in actuality a suit against the county; and second, that they are not individually answerable in a suit to redress private wrong for the Board's neglect. We hold the first defense, which is based upon Miss. Code Ann. § 4049.5 (1942 Recomp.),[17] is untenable. The fact that, under the quoted statute, Leflore County may, in its discretion, satisfy from the public coffers a personal judgment rendered against one or more supervisors is immaterial. If the county were bound by a statute to make payment for personal default, that might be another matter, but that is clearly not the case before us. What the county might elect to do toward paying the individual obligation of a supervisor, if it may legally do so, is not of present concern; the significant thing in this context is that Leflore County is required to do nothing toward satisfying a judgment obtained against an individual supervisor.

[9] The second defense raised by the supervisor-defendants is that they are not made individually liable for a violation of § 7904 by failure to promulgate and establish proper regulations for guarding county prisoners, and the default in this respect would be negligence of the Board, as a corporate entity,

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[17] Miss. Code Ann. § 4049.5 provides, inter alia, that:

"* * * [A]ny municipality of this state be and it is hereby authorized and empowered, within the discretion of the governing authorities, to pay and satisfy any judgment, fine, or penalty which may be made, assessed or levied by any court against any municipal agent, officer, servant, employee or appointee * * * while acting as such."

which is not personally chargeable to any member thereof. An examination of this defense requires a close study of applicable state law. In Mississippi, a county board of supervisors is not a mere ministerial agent of the State, but is charged with far ranging duties that are judicial, legislative and executive in character. A member of the board of supervisors is "not a ministerial but is a quasi-judicial officer.", McNulty v. Vickery, 126 Miss. 341, 88 So. 718 (1921).[18]

While many courts draw a distinction, as would plaintiff, between personal responsibility of a board member for the nonperformance of a ministerial duty, and no liability for failure to perform discretionary duties, that distinction does not appear to obtain in Mississippi, in respect of private suits to redress an individual wrong. The correct rule expounding controlling state law appears in Wray v. McMahon, 182 Miss. 592, 182 So. 99 (1938), in which the Court sustained a demurrer interposed by the Mayor and Commissioners of the City of Greenwood in a private ac-

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[18] Particularly elucidative are the observations found in State ex rel. Bank of Commerce & Trust Co. v. Forbes, 1937, 179 Miss. 1, 174 So. 67, at p. 69:

> "Board of supervisors are not mere ministerial agents of the state. Prior to the adoption of the State's Constitution in 1832 many of the duties now imposed on such boards were discharged by a county court. They appear in the judiciary articles of the Constitutions of 1832 and 1890, in the first under the name of boards of police * * * and in the second under their present name. * * * and are charged with duties judicial, legislative and executive; and in McNulty v. Vickery, 126 Miss. 341, 88 So. 718, it was expressly held that a member of the board of supervisors is not a ministerial, but a quasi-judicial officer."

tion by a plaintiff allegedly injured by an unprovoked assault and battery committed upon him by two Greenwood policemen. Pointing out that employment of policemen was vested by statute solely in the Mayor and Commissioners acting as a governmental body, and not in any of them as individuals, the State Supreme Court held:

> "This court, by several decisions heretofore rendered, has firmly committed itself to the rule, which generally prevails, that a governmental board or council as such, acts in an official, and not in an individual capacity; and any neglect or failure in the exercise of its powers or in the discharge of its duties is the default of the board and not of the individuals composing it, and they are not liable for such neglect or default unless expressly made so by statute. State ex rel. Bank of Commerce & Trust Co. v. Forbes, 179 Miss. 1, 174 So. 67; Reese v. Isola State Bank, 140 Miss. 355, 105 So. 636; Pidgeon Thomas Iron Co. v. Leflore County, 135 Miss. 155, 99 So. 677, and the cases cited in those opinions."[19]

[10] The significance between a ministerial and a discretionary act of a supervisor, as regards his per-

[19] By statute, members of boards of supervisors are personally liable for: appropriation of money, for an object not authorized by law (§ 2944); the practice of nepotism (§ 4051); diversion of county bond proceeds (§ 2926-10); failure to comply with provisions as to publication of proceeds (§ 2889); withholding of county funds from the county tax collector (§ 3008); maintaining interest in public contracts (§§ 2301, 2302, 2920; Constitution § 109); failure to comply with provisions respecting county bonds (§ 4323); exceeding the county budget (§ 9118-10); maintaining interest in claim against county budget (§ 2313); and willful delay of presentations of any claim against the county budget (§ 9118-12).

sonal liability, is controlled by the nature of the action brought against him. If it is a suit for the public benefit, liability will be personally imposed for dereliction in the performance of a ministerial act as held in Walton v. Colmer, 169 Miss. 182, 147 So. 331, 148 So. 635, (1933), but not in a suit brought to redress private wrong. This question was definitely settled by People's Bank Liquidating Corporation v. Beashea Drainage Dist., 199 Miss. 505, 24 So. 2d 784, (1946), in which drainage commissioners were sued by bondholders for the failure of the drainage district, in its corporate capacity, to assess additional benefits against lands in order to pay for the bonds that it issued. Very plainly the commissioners had failed to comply with ministerial duties imposed upon the drainage district by law, for the protection of its bonds, and individual liability was urged on the authority of First National Bank of Key West v. Filer, 107 Fla. 526, 145 So. 204, 87 A.L.R. 267, and similar authorities which are here cited by plaintiff. The Mississippi Supreme Court considered at length the wisdom of engrafting an exception on the general rule of nonliability of a board member, which had been left open in its earlier decision of State ex rel. Bank of Commerce & Trust Co. v. Forbes, supra. The issue was foreclosed in Mississippi against engrafting an exception in these words:

> 'The Court declined to express an opinion in the Forbes case as to whether such an exception should be recognized where a member of a board personally joins in and lends his efforts towards the accomplishment of the wrongful acts of the body or board itself as an entity, as held by the

> Florida Court. *Moreover, such an exception is contrary to the policy announced in our other decisions on the question; and especially where the suit is brought on behalf of private individuals.*'[20] (Emphasis added) People's Bank, etc. v. Beashea Drainage Dist., 24 So. 2d, at 794.

Insofar as state law is concerned, the foregoing is dispositive of the non-liability of defendant-supervisors since this is a private action brought for personal injury and there is no statute which imposes personal liability upon supervisors for noncompliance with § 7904 or other statute relating to the operation and management of the county farm. Some cases have held that an immunity granted by state law will be respected in a § 1983 action.[21] It is unnecessary for us to align ourselves with that view since by the weight of federal authority, § 1983 immunity is granted to a state officer for his failure to perform a discretionary act as opposed to a mere ministerial duty.[22] Immunity

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[20] See pertinent annotation in 123 A.L.R. 756, following the reported opinion of the Florida Supreme Court in Fidelity & Deposit Co. of Maryland v. Cone, 138 Fla. 804, 190 So. 268, 123 A.L.R. 750 (1939), collating authorities expressly rejected by the Mississippi Supreme Court as being contrary to the policy announced in its decisions, at least as pertains to a suit brought on behalf of a private party.

[21] Zellner v. Wallace, 233 F. Supp. 874 (M.D. Ala. 1964), citing Nesmith v. Alford, 318 F.2d 110 (5 Cir. 1963).

[22] As held in Selico v. Jackson, 201 F. Supp. 475, 478 (S. D. Cal. 1962):

> "It is well settled that a public official is immune from civil suit based upon discretionary acts performed within the scope of his authority, regardless of the motives with which he performs his duties, and this immunity is not abrogated by the Civil Rights statutes." See, e.g., Dunn v. Estes, 117 F. Supp. 146, 148 (D. Mass. 1953);

for discretionary or quasi-judicial action, although first developed in suits against judges and later prosecutors, has been generally extended to legislative and administrative officials.[23] As previously stated in this opinion, § 1983 did not "abolish wholesale all common law immunities." Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288, supra, p. 979; and "the immunity of legislators for acts within the legislative role was not abolished." Ibid. Cf. Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).

[11] As applied to the case at bar, while § 7904 imposes upon the Board a duty to promulgate regulations for the guarding of prisoners, it makes no attempt to dictate what regulations might be "proper";

Sims v. United States, 252 F.2d 434, 441 (4 Cir. 1958); Taylor v. Glotfelty, 201 F.2d 51 (6 Cir. 1952); Cooper v. O'Connor, 70 App. D.C. 238, 105 F.2d 761, 763 (1939).

[23] It is noteworthy, we think, that Mississippi was first to extend legislative immunity to legislators of all grades—e.g., members of boards of supervisors, city councilmen, etc., Jones v. Loving, 55 Miss. 109 (1877). For detailed analysis and annotation on the question of liability of officials, see excellent discussion in 2 HARPER AND JAMES, THE LAW OF TORTS, § 29.10, pp. 1638-1646 (1956), reading in part as follows (pp. 1641-42):

> "The rule of immunity of officers for discretionary acts, and its extension represent a judgment that the benefits to be had from the personal liability of the officer (especially since the prospect of actual compensation to the victim from that source is slight) are outweighed by the evils that would flow from a wider rule of liability * * * [I]f personal liability may be visited upon officers who have acted in accordance with their apparent commands and their best judgment in these matters, we are likely to breed a race of do-nothing officials. The tendency is to protect the officer by regarding his function as quasi-judicial or discretionary."

and the only reasonable inference to be drawn therefrom is that the legislature intended that the Board have unfettered discretion in drawing what regulations it deemed proper.[24] We are clear that under any applicable federal law, county supervisors may not be held personally liable for failure to issue any regulations where, had they in fact issued certain regulations, they could not be held individually responsible for neglect of the Board in failing to provide regulations of such character as would reasonably protect the interest of the working convicts. Conceivably, regulations might have been established by the Board imposing the most exacting standards of proficiency in the use of firearms for one to be an armed guard, or which might have prescribed under what precise conditions a trusty could carry firearms, or again which might have altogether prohibited the use of convicts for armed guard duty. These matters go entirely to the exercise of judgment and discretion; had the Board acted negligently in the adoption of imperfect regulations, there would be no liability because of the discretionary nature of the act. The Board's nonfeasance in the same area of discretion may lead to

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[24] The test for determining whether a particular act is ministerial or discretionary was well stated in Poyner v. Gilmore, 171 Miss. 859, 158 So. 922, 923 (1935), as follows:

> "The most important criterion, perhaps, is that [if] the duty is one which has been positively imposed by law and its performance required *at a time and in a manner or upon conditions which are specifically designated*, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion, the act in discharge thereof is ministerial." (Emphasis added).

no different result. Liability under § 1983 is to be read "against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492, supra, p. 981. In the final analysis, plaintiff cannot point to any individual act of a supervisor as having a causal relation to the subject matter of this litigation and the personal injuries sustained by plaintiff, and defendants who occupy the position of supervisors are entitled to be dismissed from the suit.

III

LIABILITY OF SUPERINTENDENT ARTERBURY UNDER MISSISSIPPI LAW AND THE EIGHTH AMENDMENT

[12, 13] Under state law, John Arterbury, having custody of the county prisoners as farm superintendent, is under a plain legal duty to exercise ordinary and reasonable care under the circumstances of each particular case for the preservation of the life and health of those subject to his charge. This duty is the same as that imposed upon a county sheriff with respect to prisoners in the county jail. In Farmer v. State, 224 Miss. 96, 105, 79 So. 2d 528 (1955), which rejected the defense of immunity and imposed tort liability against the sheriff, the court aligned itself with the rule announcing a duty of ordinary care in these terms:

> "When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care,

> under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond."

Although Miss. Code Ann. § 7915 was not directly mentioned in the foregoing case, the terms of the statute require nothing less than a standard of proper care under the circumstances.[25] This accords with the general rule to the effect that a jailer must exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, that he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate, but he is responsible for the consequences of his own neglect. 41 Am. Jur., Prisons and Prisoners, §§ 12 and 13, pp. 893-94. City of Topeka v. Boutwell, 53 Kan. 20, 35 P. 819 (1894); Peters v. White, 103 Tenn. 390, 53 S.W. 726 (1899); Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940). See Anno. 46 A.L.R. 114, and 61 A.L.R. 566.[26]

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[25] Additionally, Miss. Code Ann. § 7915 (1942 Recomp.) provides that:

> "An official or guard, or other employee having the custody of any county prisoner, or any official or employee of the county having the custody of any county prisoner, who shall maltreat or abuse any such convict, or who shall knowingly permit the same to be done * * * shall be deemed guilty of a misdemeanor * * *."

[26] The last annotation includes an opinion by the Kentucky Court of Appeals in Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928), which contains the following statement:

[14, 15] While prison administration and methods of handling prisoners are matters largely committed to the institution's custodian and are not to be critically reviewed by courts in the absence of manifest breach of duty of ordinary care, it remains that the custodian cannot act in a way that exposes others unnecessarily to danger. We pretermit a consideration of whether in this modern age the use of inmates as armed guards comports with best prison standards, for it has not been shown that the trusty system is necessarily injurious to prisoners' welfare. The more limited inquiry here is whether Arterbury exercised requisite degree of care when he decided to make Williams a trusty and furnished him with firearms for duty as an armed guard. In making that decision, Arterbury was bound to exercise care commensurate with the dangerous nature of the article being turned over to Williams; and to fail to exercise that degree of care would be Arterbury's personal dereliction, for he might have reasonably foreseen the consequences of likely injury to another prisoner if the shotgun were in the hands of an untrained, incompetent guard, or one who was ignorant as to its safe and proper use. The rule in Mississippi with respect to handling of loaded firearms imposes the highest degree of care,

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"In all of these cases the liability of the jailer for such injuries is recognized where he had reasonable ground to apprehend the danger to the prisoner. The law imposes the duty on a jailer to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody, but he cannot be charged with negligence in failing to prevent what he could not reasonably anticipate.'

as was enunciated in State, to Use of Johnston v. Cunningham, 107 Miss. 140, 65 So. 115, 118, 51 L.R.A.,N.S., 1179 (1914):

> The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. * * * A high degree of care is necessary in the use or manipulation of loaded weapons in the presence or vicinity of other persons, and where injury results from a failure to exercise such care, the defendant is liable. * * * The bearer of loaded firearms is bound to exercise the utmost diligence in their handling, and he is liable for any injury caused by their discharge, unless it appears that he was entirely without fault. * * *"

The language of the Mississippi Supreme Court is but a refrain of the law generally. "Some courts refer to the degree of care [in the handling of a firearm] required as a high degree of care; others say that the utmost or highest degree of care must be used to the end that harm may not come to others. More often, the requisite degree of care is defined as such care as is commensurate with the dangerous nature of the firearm." 56 Am. Jur., Weapons and Firearms, § 23, p. 1006.

[16] Another applicable principle is that relating to consequences flowing from negligent allowance for a third person to use an instrumentality where the actor knows or should know that such third person is likely to use that instrumentality in a way to create

a reasonable risk of harm to another person. Restatement of the Law of Torts, § 308, declares:

> "It is negligent to permit a third person to use a thing or to engage in an activity which is under the control of the actor if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. * * * The rule stated in this Section has its most frequent application where the third person is a member of a class which is notoriously likely to misuse the thing which the actor permits him to use. Thus, it is negligent to place loaded firearms or poisons within reach of young children or feeble-minded adults." Accord, Lovett Motor Co. v. Walley, 217 Miss. 384, 64 So. 2d 370 (1953).

[17] If we were confronted solely with negligence, or even recklessness on the part of Williams, the trusty, without any evidence indicating Arterbury's personal neglect, obviously Arterbury would not under those conditions be chargeable with Williams' conduct because, here again, the doctrine of respondeat superior does not apply.[27] The evidence, however, clearly points to failure on the part of Arterbury himself in using care measured either in terms

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[27] See, e.g., Lunsford v. Johnston, 5 Tenn. C.C.A., aff'd 132 Tenn. 615, 179 S.W. 151, 11 N.C.C.A. 638 (1915); Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949 (1918); Kebert v. Board of County Commissioners, 134 Kan. 401, 5 P.2d 1085 (1931); Fernelius v. Pierce, 22 Cal. 2d 226, 138 P.2d 12 (1943); Metoyer v. Holman, 358 F.2d 110 (5 Cir. 1966); Martinez v. Cahill, 215 Cal. App. 2d 823, 30 Cal. Rptr. 566; St. Julian v. State, La. App., 98 So. 2d 284 (1957).

of the highest degree or in terms of ordinary care under the circumstances, in turning over to Williams a loaded gun without making certain that Williams was competent to handle it. Cursory questioning of Williams as to whether he understood how to handle a shotgun was wholly inadequate to satisfy a duty in dealing with a dangerous instrumentality. As we view the evidence, the instructions given by Arterbury were meager at best, and in no way did he ascertain Williams' proficiency in handling the weapon either respecting markmanship or safety measures. No heed was paid to well known and important safety measures in handling a gun. Williams was not told to recheck the safety mechanism at every manipulation of the gun, never to point the shotgun in any direction or at any object at which he was not ready to fire. Since the shooting in this case occurred under the most needless and avoidable circumstances, it is patent that Williams was thoroughly ignorant—indeed incompetent—in the handling of a firearm. It was Arterbury's duty to exercise care that Williams knew how to use the gun and could handle it safely before giving him possession of it, instructing him to use it in guard duty and to keep it ready for firing at any moment. If the gun had to be ready for firing at any moment, as Arterbury instructed Williams to have it, all the greater would be the degree of care necessary to be exercised by Arterbury in giving of minute and detailed safety instructions to Williams or anyone else handling a loaded weapon under such circumstances. We absolve Arterbury of plaintiff's charge that Wil-

liams was morally unfit to be an armed guard, as we are not convinced that Williams was a person of murderous and malicious instincts, but we cannot absolve Arterbury of his own negligence in delivering a loaded firearm to a person ignorant with respect to its safe handling. The negligence of Arterbury in this respect, combined with the negligence of Williams in mishandling the gun, produced a classic case of causation which proximately resulted in the shooting of and personal injuries to plaintiff. It is no answer to say, under these circumstances, that Columbus Williams alone is responsible for the consequences of his negligence, but that responsibility must be shared by Arterbury because of his own concurrent, tortious conduct.[28]

[18] Finally, Arterbury, as a public official in charge of the county farm, has no state-recognized immunity from suits in tort and, as heretofore discussed, should Leflore County see fit in its discretion, under Miss. Code Ann. 4049.5, to pay a judgment against Arterbury, that would not convert this action into a suit against the county.

[19, 20] Having concluded Arterbury is liable under state law, we are clear in the view that liability likewise exists under § 1983. It is an established

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[28] See, e.g., American Creosote Works of Louisiana v. Harp, 215 Miss. 5, 60 So. 2d 514, 35 A.L.R.2d 603 (1952); Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 50 So. 2d 578 (1951); Gulf Refining Co. v. Brown, 196 Miss. 131, 16 So. 2d 765 (1944); Brewer v. Town of Lucedale, 189 Miss. 374, 198 So. 42 (1940); see also, Annot., 38 Am. Jur., Negligence, § 63, p. 715, 100 A.L.R.2d 989.

principle that a person confined in a state or county prison is within the protection of 42 U.S.C. § 1983, and the right of a state prisoner to be free from cruel and unusual punishment, or to be within the protection of the Eighth Amendment, is one of the rights that a state prisoner may, in a proper case, enforce under § 1983. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. S.D. 1966).[29]

[21, 22] It is equally well settled that Arterbury, holding the public office of county farm superintendent, was acting under color of state law within the meaning of § 1983. With the plaintiff having the protection of the statute and Arterbury being subject to its terms, the only question remaining is whether the plaintiff has shown the violation of a federally protected right, or that he has been subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States." This brings up for direct analysis the scope

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[29] In Jordan v. Fitzharris, the Court said at p. 679:

"The Civil Rights Act, 42 U.S.C. § 1983, creates a cause of action for deprivations, by persons acting under color of state law, of rights secured by the Constitution. See Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Persons confined in state prisons are within the protection of 42 U.S.C. § 1983. See Cooper v. Pate, 378 U.S. 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964); Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963); Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963). The right to be free from cruel and unusual punishment is one of the rights that a state prisoner may, in a proper case, enforce under § 1983. Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark 1965); United States ex rel. Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963); Gordon v. Garrison, 77 F. Supp. 447 (E.D. Ill. 1948); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965)."

of the Eighth Amendment, which is applicable to the states and state officers.[30] In 1910, the United States Supreme Court declared that "what constitutes a cruel and unusual punishment has not been exactly decided," Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910), and the observation has been made that that statement is as true today as it was in 1910. Jordan v. Fitzharris, supra. A pertinent inquiry has always been for a court to ask whether under all the circumstances the punishment in question is of such character as to shock general conscience or be intolerable to fundamental fairness. "Unlawful [prison] administration can exist where there are aspects of institutional treatment of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness. Such treatment is entitled to be held to be within the ban of the Eighth Amendment as representing cruel and unusual punishment and so constituting unlawful administration of prison sentence. It may be observed in this connection that penal admeasurements of fundamental fairness doubtless will not be without some relationship to the humane concepts and reactions of present-day social climate." Lee v. Tahash, 352 F.2d 970, 972 (8 Cir. 1965).[31]

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[30] Eighth Amendment to the Constitution of the United States:

"Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted."

[31] In Jordan v. Fitzharris, supra, 252 F. Supp., at page 679, the Court said:

"The first approach is to ask whether under all of

[23] Imprisonment under the extra hazardous conditions to which plaintiff was needlessly exposed, and which culminated in permanently maiming and totally disabling him, was so severe and shocking to the conscience, and so utterly disproportionate to the crime—petty larceny for taking of articles of the retail value of $2.11—as to constitute cruel and inhuman punishment. It is not that the armed trusty system is to be viewed as "cruel and unusual" in itself, but rather the unprovoked, grossly negligent shooting of a prisoner by one negligently entrusted with firearms that violates the constitutional right. Indeed, it is our view that the moral sense of all reasonable men of this day would be shocked by the punishment visited upon the plaintiff, yet a minor, as a direct result of inattentive and careless prison administration.

[24] Liability against Arterbury having been established, there remains our duty to assess compensatory damages in fair and reasonable amount to plaintiff, Arthur Roberts, in this action brought directly for his own benefit. As previously noted,[32]

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the circumstances the punishment in question is 'of such character * * * as to shock general conscience or to be intolerable to fundamental fairness.' * * * Such a judgment must be made in the light of developing concepts of elemental decency. * * * Secondly, a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. * * * Finally, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used."

[32] See fn. 9, page 977, of this Opinion.

plaintiff, because of the shooting, has lost the sight of both eyes, and has recurring headaches, occasional fainting spells and probable brain damage. With a life expectancy of almost 50 years, he will be totally disabled as long as he lives. Correct determination of legal damages is not without its difficulty, particularly since no proper proof of damage has been made for the apparently considerable accrued hospital, medical, nursing and other special services rendered plaintiff over a period of many months,[33] nor has the plaintiff, fourteen years old at the time of the accident, been able to show a history of earnings or establish loss of probable earning power or what might be prospective loss of earnings. Nevertheless, substantial recovery is not to be denied an injured minor because of his inability to show present earnings where the evidence, as here, fully justifies such an award. 22 Am. Jur. 2d, Damages, § 101, p. 148. It is reasonable to conclude that, upon attaining his majority, plaintiff would have been able to perform ordinary employment, qualifying him for minimum wages under a 40-hour week, and that his injuries have deprived him of this ability to earn a living for the rest of his life and rendering him a charge upon the public,

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[33] This may be due to the fact that such expenses may have already been paid by the county. In any event, independent claims by Eddie Roberts, father and sole surviving parent, for recovery of medical expenses and reduced earning capacity of plaintiff during his minority have been waived since Eddie Roberts brought suit for the minor plaintiff as father and guardian. Anderson v. Jenkins, 220 Miss. 145, 70 So. 2d 535 (1954), medical expenses; Brookhaven Lumber & Manufacturing Co. v. Adams, 132 Miss. 689, 97 So. 484 (1923), reduced earning capacity during minority.

absent a fair recovery in this case. During the four years since this accident occured, plaintiff has experienced great physical pain and suffering and also untold mental agony, embarrassment and humiliation; and he will indefinitely continue to endure both physical suffering and mental anguish. His incapacity borders upon personal helplessness in many ways and he will require, for an indeterminate period of time, special care and assistance from others who are entitled to be reasonably compensated for their service. After full consideration of each element of proven damage and the extent and nature thereof, the court concludes that the minor plaintiff is entitled to recover from defendant Arterbury the sum of $85,000 and all costs of this action.

Judgment in accordance with this Opinion will be entered this date.